IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 348

THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PAUL M. NIEBELL,
W. W. PRYOR,
C. MAURICE WEIDEMEYER,
Counsel for Petitioner.

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INDEX.

Subject Index.

Citations.

Statutes and Treaties.

MISCELLANEOUS.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinions of the Court of Claims (R. 8-39, 39-42) are reported in 93 C. Cls. 500, and 93 C. Cls. 534.

Jurisdiction.

The judgment of the Court of Claims was entered on January 6, 1941 (R. 39). Motion for a new trial filed in the proceedings was allowed as to certain items of the claim and overruled as to other items on May 5, 1941 (R. 39-43). The petition for a writ of certiorari was filed August 5, 1941, and

was granted October 13, 1941 (R. 74). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288 of the Jud. Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional act, approved May 20, 1924, c. 162, 43 Stat. 133, provides in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."
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> "Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, * * *"

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to

hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; and any case presenting claims which may have been dismissed upon the ground that new claims were set up by amended petition, after the expiration of the time limitation fixed in said original Jurisdictional Acts, as amended, shall be reinstated and retried by said court on their merits."

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

"In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought here by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

In order to avoid repetition the provisions of the treaties and statutes involved in the several items of the claim will be set forth in the discussion of said items.

Questions Presented.

The questions presented are as follows:

1. Whether an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty; unless Congress, by subsequent legislation, provides that payments be otherwise made; and whether the United States is liable to the tribe for the balance of any moneys not so disbursed and expended.

2. Whether the Secretary of the Interior has plenary power over the funds of an Indian tribe, and can disburse tribal funds without the authority of Congress, and in contravention of the express prohibition by Congress against such disbursement.

3. Whether Congress by Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495, 502) prohibited payments of tribal moneys to the tribal officers of the Five Civilized Tribes; and if so, whether the Secretary of the Interior was required to comply with this provision of law.

4. Whether the United States has the burden of proving affirmatively its gratuity offsets under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596.

5. Whether the United States must prove affirmatively that amounts claimed by it as gratuity offsets were disbursed *gratuitously* and for the *benefit* of the Seminole *Nation as such* before said amounts are allowable as gratuity offsets under said Act of August 12, 1935.

6. Whether amounts disbursed by the United States as administrative expenses and incidental to the fulfillment of its treaty and agreement obligations to petitioner are gratuity offsets under said Act of August 12, 1935.

Statement.

The Act of May 20, 1924, *supra, as amended*, conferred upon the Court of Claims jurisdiction to adjudicate the legal and equitable claims of the Seminole Nation against the United States growing out of treaties, agreements and acts of Congress relating to Indian Affairs.

On February 24, 1930, the Seminole Nation filed suit under the above act. The trial of the case was delayed some four years for a general accounting of Seminole funds requested by the Government, and this accounting report was filed by the United States in the record of the Court below. On September 19, 1934, the Seminole Nation amended its petition to conform to the facts set forth in said accounting report, and the case was submitted to the Court of Claims on June 4, 1935. On December 2, 1935, the Court rendered a decision on the claims presented in the amended petition awarding judgment for $1,317,087.27 in favor of the Seminole Nation (82 C. Cls. 135).

Upon a review of the above decision, this Court held that the amended petition embodied new claims raised for the first time therein, and, said petition having been filed after the expiration of the limitation for filing suits as fixed in the jurisdictional act, the Court of Claims had no jurisdiction to render the above judgment (*United States* v. *Seminole Nation*, 299 U. S. 417).

The case was reinstated under authority of the Act of August 16, 1937, c. 651, 50 Stat. 650, and a second amended petition was filed on November 8, 1937, limiting the claims therein presented to those found to be meritorious by the lower court in its decision of December 2, 1935. In this second proceeding, after trial upon the merits, the Court of Claims, on January 6, 1941, rendered a decision dismissing the petition and overruling in many respects its original decision of December 2, 1935. On motion for a new trial, several of the errors of this last decision were corrected by the lower court, and overruled as to others.

As the case now stands there are conflicting views expressed by the lower court upon the same issues, and this Court granted certiorari to review the case and clear up the existing confusion.

The claim herein presented is one of accounting, and consists of items falling generally within two classes:

1. Items as to which the United States failed to make payments in the amount and in the manner provided by its treaties and agreements with the Seminole Nation, and

2. An item as to which payments were made by the Secretary of the Interior out of Seminole trust funds without authority of law, and in contravention of positive directions of Congress forbidding such disbursements.

Items 1 to 4 (class 1) arise and grow out of the treaties of August 7, 1856 (11 Stat. 699) and March 21, 1866 (14 Stat. 755), between the United States and the Seminole Nation of Indians, and numerous acts of Congress which will be referred to and quoted in connection with the particular items of the claim to which they apply.

Item 5 (class 2) arises and grows out of Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495), and involves the construction of said provision of law.

The particular items of the claim will be outlined briefly below.

Item 1.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, provided that the United States disburse annually for ten years $3,000 for the support of schools; $2,000 for agricultural aid, and $2,200 for the support of smiths and smith shops, a total obligation of $72,000. Congress annually appropriated the amounts to fulfill this treaty obligation during the fiscal years 1857 to 1866, inclusive. However, $10,436.58 only was so disbursed by the officers of the United States, and the balance of $61,563.42 is claimed for the Seminole Nation (R. 11-12).

Item 2.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, 702, provided for the establishment of a Seminole trust fund of $500,000, and the annual interest thereon of $25,000 was directed to be disbursed annually per capita to the members of the Seminole Nation. Although Congress annually appropriated the amounts to fulfill this treaty obligation from the fiscal years 1867 to 1909, inclusive, yet the officers of the United States failed either to disburse or apply to this treaty object a total of $154,551.28, due for the fiscal years 1867-1874, 1876, 1879, and 1907-1909 (R. 12-13; 82 C. Cls. 135, 139-140, 148-150).

Item 3.

Article 3 of the Treaty of March 21, 1866, 14 Stat. 755, provided that the United States establish a permanent school fund of $50,000 for the Seminole Nation, and the annual interest of $2,500 on same was directed to be "paid annually to the support of schools." Although Congress annually appropriated said interest for the fiscal years 1867 to 1909, inclusive, yet a total of $61,347.20 of said interest was not disbursed in accordance with the requirements of said treaty provision (R. 13-14; 82 C. Cls. 135, 141, 150, 152).

Item 4.

Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided that the United States erect suitable agency buildings on the Seminole reservation "at an expense not exceeding ten thousand ($10,000) dollars." Congress twice appropriated said $10,000 by the Acts of July 28, 1866, c. 296, 14 Stat. 310, 319, and May 18, 1872, c. 172, 17 Stat. 122, 132, but neither of said amounts, nor any part thereof, was disbursed for said treaty purpose, though $9,030.15 of the last appropriation was disbursed for some unknown purpose. However, $931.76 was disbursed from general appropriations for agency buildings and repairs within the Seminole Nation, for which the United States has been credited. A

balance of $9,068.24 is claimed under this treaty obligation (R. 14-15).

Item 5.

Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495, 502, provided as follows:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

A review of the history of this legislation shows that by the Act of April 15, 1874, c. 97, 18 Stat. 29 (which applied to Treaty of August 7, 1856 funds only), and the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, the Seminole tribal officers were entrusted with the disbursement of certain of the Seminole tribal income. The reports of the Dawes Commission for the years 1894 to 1898 state that the tribal governments of the Five Civilized Tribes were grossly corrupt; that the affairs of these tribes had fallen into the hands of a few energetic mixed-blood Indians and white men who were using the tribal funds to further their own personal interests, and were amassing large fortunes by robbing the other and more ignorant members of the tribe of their share of the tribal estate. Such activities of the Seminole tribal officials had been reported to the executive officers of the United States as early as 1869 (R. 60).

To put a stop to the dissipation of the tribal income of these tribes by the tribal officers, Congress, under the Curtis Act, assumed full administrative control over the property and affairs of the Five Civilized Tribes, directed the allotment of the tribal lands, and the equal division of the funds of said tribes among the members thereof. As a part of

this broad comprehensive scheme, said Section 19 forbade the payment of the tribal funds thereafter to the tribal officers on any account whatever for disbursement.

In utter disregard of this express prohibition of Congress, the Secretary of the Interior, during the fiscal years 1899 to 1907, inclusive, continued to pay over to the Seminole tribal officers the Seminole tribal moneys, and thus permitted the robbery of a helpless people to continue until it was stopped finally by an opinion of the Attorney General (26 Op. Atty's Gen. 340). The petitioner claims the sum of $864,702.58 which was disbursed in direct contravention of this positive provision of law (R. 15).

Specification of Errors to be Urged.

As to the affirmative items 1 to 4 of petitioner's claim, the lower court erred in holding as its conclusions of law:

1. That an Indian tribe is not entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, and that the United States is not liable to the tribe for the balance not so disbursed or expended.

As to Item 1 particularly—the lower court erred in holding that the United States was authorized by the Act of July 5, 1862, c. 135, 12 Stat. 512, 528, to divert for the relief of refugee Indians the amount of $61,663.42 of the total required to be disbursed by the United States for schools, agricultural assistance, and smiths and smith shops under Article 8 of the Treaty of August 7, 1856; and that the release in Article 8 of the Treaty of March 21, 1866, affects the right of the Seminole Nation to recover for this unfulfilled treaty obligation.

As to Item 2 particularly—the lower court erred in finding, contrary to the evidence adduced, that the following amounts appropriated to fulfill Article 8 of the Treaty of August 7, 1856—requiring said moneys appropriated to be disbursed per capita to members of said tribe—were dis-

bursed by the United States for the benefit of the Seminole Nation, and in holding that the respondent is entitled to credit in said amounts, though disbursed in violation of said treaty provision:

1870	$17,821.00
1871	12,500.00
1872	12,500.00
1873	12,500.00
1874	11,101.64

With respect to this item the lower court further erred in holding that the United States may disregard the provisions of Article 8 of said Treaty of August 7, 1856, directing the annual interest on the Seminole $500,000 fund to be paid per capita to members of the tribe, and that the United States may disburse moneys appropriated by Congress to fulfill this treaty obligation for purposes and in a manner other than those specified in said treaty.

As to Item 3 particularly—the lower court erred in holding that the United States could disregard the provisions of Article 3 of the Treaty of March 21, 1866, requiring the United States to disburse $2,500 annually for the support of schools within the Seminole Nation, and also in violation of said Section 2097 of the Revised Statutes of the United States, and thus avoid its responsibility by disbursing moneys other than in accordance with the said provisions of law.

As to Item 4 particularly—that the lower court erred in holding that the United States substantially complied with Article 6 of the Treaty of March 21, 1866, requiring it to construct suitable agency buildings on the Seminole reservation at an expense not exceeding $10,000, by a disbursement of $931.76 only for such purpose, after dissipating most of the $10,000 appropriated by Congress to fulfill this treaty obligation and disbursing it for a purpose not shown.

2. That the lower court erred in holding substantially that the Secretary of the Interior, and not Congress, has

plenary power over the affairs of an Indian tribe, and that said Secretary can disburse Seminole tribal funds in direct contravention of a prohibition by Congress against such disbursement.

3. Further, the lower court erred in holding that Section 19 of the Curtis Act does not contain a broad and comprehensive prohibition against the payment of any tribal moneys on any account whatever to the tribal officers for disbursement, but that the meaning of said provision is limited to a prohibition against the payment of tribal moneys to the tribal officers for per capita payments only.

As to the counterclaims allowed, the lower court erred in holding and finding:

1. That the United States need not prove affirmatively that the items claimed as gratuity offsets under said Act of August 12, 1935, were disbursed gratuitously and for the benefit of the Seminole Nation before it is entitled to such offsets.

2. That the amounts disbursed by the United States for administrative expenses and as incidental to the performance of its treaty and agreement obligations with the Seminole Nation are gratuity offsets, rather than holding that said expense is to be borne by the United States as necessarily incidental to the performance of its treaty and agreement obligations with petitioner.

3. That the United States is entitled to a gratuity offset for $165,847.17 disbursed by it in purchasing lands of the Creek Nation for the Seminoles, upon which lands the Seminoles had been erroneously located by the United States and encouraged to make valuable improvements in reliance upon the promise of the United States that if the first survey of the boundaries be found to be in error the United States would protect them in their improvements.

4. That the petitioner is chargeable with any part of the items of Education, Sale of town lots, Sale of town sites,

Probate expenses, General Office Expense, Surveying Segregated Coal and Asphalt Lands, and other like items of gratuity offset, without substantial evidence in the record to support such a charge against the petitioner.

5. That petitioner is chargeable with a gratuity offset of 3.72 per centum of items totaling $11,416,066.55 (Finding 18, R. 19-20) obtained by the use of population figures of the Five Civilized Tribes from 1866 to 1934, rather than a percentage of 3.08 based upon population figures shown by the final rolls of petitioner and the other Five Civilized Tribes made by the Dawes Commission over a period from 1896 to 1907, inclusive, and then only when it is affirmatively shown that petitioner actually received the benefit of such items, and that they were not disbursed in fulfillment of the agreement obligations of the United States owing to petitioner.

Summary of Argument.

Our argument with respect to items 1 to 4 of the affirmative claim of petitioner will be devoted to the application of the following general principle:

> "* * * that an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, unless Congress by subsequent legislation provides that payments be otherwise made, and that the United States is liable to the tribe for the balance of any moneys not so disbursed and expended." Seminole Nation v. United States, 82 Ct. Cls., 135, 153-154).

In support of this principle the petitioner relies upon the various provisions of treaties setting forth the obligations of the United States, and Section 2097 of the Revised Statutes of the United States (Act of July 26, 1866, c. 266, 14 Stat. 255, 280) which provides that:

> "No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner

not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law."

With respect to Item 5 of petitioner's claim, our argument will be devoted to the application of the following principle:

"That Congress has plenary power over the administration of Indian affairs is well settled. Cherokee Nation v. Georgia, 5 Pet. 1; Cherokee Nation v. Hitchcock, 187 U. S. 294; Lone Wolf v. Hitchcock, 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements must be determined." Seminole Nation v. United States, 82 C. Cls. 135, 154; Creek Nation v. United States, 78 C. Cls. 474.

Our argument on the gratuity offset phase of this case may be summarized as follows:

1. That disbursements made to fulfill the treaty and agreement obligations of the United States have been improperly allowed as gratuity offsets against the legal claims of petitioner.

2. That disbursements have been wrongfully allowed as gratuity offsets against petitioner's legal claims without proper proof that said amounts were disbursed *gratuitously*, or for the *benefit* of the Seminole Nation as such.

3. That the mere recital of the Supplemental Report of the General Accounting Office, without further proof or argument, would not be sufficient evidence to support an allowance of a gratuity offset against petitioner.

Argument.

The identical claims herein presented were upheld by the lower court in its first decision (82 C. Cls. 135). In its second decision (93 C. Cls. 500, 534) the lower court refused

recovery. We will review each item of our claim in an endeavor to show the court that the first decision of the lower court was correct.

Item 1.o

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, between the United States and the Seminole Nation, provided in part that:

> "In consideration of such release, discharge and obligation, * * * The United States do therefore agree and stipulate as follows, viz.: To pay to the Seminoles now west, * * * to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, said sums to be applied to these objects in such manner as the President shall direct. * * *"

Congress appropriated the money annually to fulfill this obligation, totaling $72,000, but $10,436.58 only was disbursed for the objects specified in the treaty, leaving a balance due petitioner under this obligation of $61,563.42, which is claimed herein.

In its decision of December 2, 1935, the lower court permitted recovery in the amount of $61,563.42, pointing out that the Act of July 5, 1862, c. 135, 12 Stat. 512, 528, providing for the diversion of annuities of the Five Civilized Tribes never became effective, and further that the release in Article 8 of the Treaty of March 21, 1866, had no application to the claim herein presented (82 C. Cls. 135, 146, 147).

However, in its later decision of January 6, 1941, the lower court erroneously held that said Act of July 5, 1862, applied to this treaty obligation, and that the release in the Treaty of March 21, 1866 barred recovery on this claim. We submit that the lower court here failed to give due consideration to the fact that the Act of July 5, 1862 never became effective as to the Five Civilized Tribes. This act reads in part as follows:

"That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas and other affiliated tribes, may and shall be suspended or postponed wholly or in part at and during the discretion and pleasure of the President: Provided, further, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the Government. * *"

This act is so worded that it does not become operative except "during the discretion and pleasure of the President," when the tribes mentioned shall be found to be in actual hostility to the Government of the United States. Upon being urged to act, President Lincoln refused and withheld judgment in the matter (American Indian Under Reconstruction, by Dr. Annie Heloise Abel, Lib. Cong., Call No. E 540.13A22, notes 496-497, pages 251, 252).

Before the beginning of the Civil War (1861) and before there was any idea that the Five Civilized Tribes might become involved in it, the respondent had become indebted to petitioner under this treaty provision in substantially the whole amount claimed (*Seminole Nation* v. *The United States*, 82 C. Cls. 135, 147). This sum, with no thought of the Civil War, it had simply failed to pay, and the respondent is now endeavoring to use the Civil War as an excuse for its failure to pay this treaty obligation.

In passing upon this very question the lower court, in its first decision, said (82 C. Cls. 135, 146):

"The act of July 5, 1862, supra, was operative only 'during the discretion and pleasure of the President.' It is not shown that the President ever took any action under this statute either by declaring by proclamation the abrogation of 'all treaties' with the Seminoles, or

by directing that 'appropriations heretofore or hereafter made' to carry into effect treaty stipulations with them 'be suspended and postponed wholly or in part.' Without action on the part of the President the act by its own terms was ineffective."

We submit that this is a correct analysis of the situation with respect to the Act of July 5, 1862.

The Court knows from a reading of the history of this period that the Seminole Nation was, of all the Five Tribes, the most loyal to the Union. As we have seen, even President Lincoln refused to put into effect a punitive measure against these tribes. In the early stages of the war—though by treaty the United States was bound to protect the Seminoles from invasion—the Federal troops were withdrawn from Indian Territory, and it was overrun by Southern troops. The Seminoles were forced to abandon their homes and flee into Kansas, where they remained as refugees until after the War (1862 Rept. Comr. Ind. Aff., pp. 142-143; Ibid, 1863, p. 185). The United States Agent for the Seminoles, in reviewing this period stated in part as follows (1869 Rept. Comr. Ind. Aff., pp. 417, 418):

> " * * * They were driven from their homes, their property destroyed, their houses burned, and their stock driven off without compensation to their lawful owners. * * * Opothleyohola, with a band of loyal Creeks and Seminoles, in midwinter started with their women and children for Kansas, a distance of more than three hundred miles. Without adequate food and clothing they traveled on their weary march. They were pursued by men of their own race, and the bloody battles of Cedar and Bird Creeks attest the courage and patriotism of that good old man and his faithful followers. Freezing, starving and dying, they at length reached Kansas, and their able-bodied men immediately enlisted in the service of the government; and the history of the three Indian regiments present as honorable record as any of all the noble army that served the nation. When the war ended they were destitute and scattered from the Red River to Kansas. Again they sought the protection of the government.

> They formed new treaties; they complied with all the conditions imposed upon them; * * * They took hold of the question of reconstruction and settled it at once, practically, peaceably, and firmly. They have reopened their schools and churches; have re-built their homes, and are fast becoming surrounded by stock, farms, and all the comforts of life. With such a record should not the government repay them for their losses, faithfully and promptly carry out all their treaty stipulations, repel the encroachments of white men, and pay them for their lands, and see that justice is done them in all their intercourse with white men?"

Also the lower court failed to give proper consideration to the effect of the release of said Treaty of March 21, 1866. Article 8 of said Treaty of March 21, 1866, provides in part as follows:

> "The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called Confederate States. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. * * *"

Let us say frankly that we are unable to attack this release. It is "the supreme law of the land." Drawn up in the heat of reconstruction the above release can be said to be highly penal in nature, and is to be construed strictly. Surely it is not to be given an effect beyond its plain terms.

The confirmation of the diversion of annuities was limited to those made "from the funds of the Seminole Nation," and covered claims arising out of the Civil War period. The Seminole Nation had funds to its credit in the United States Treasury at this time, which had been established under the Treaty of August 7, 1856, the interest on which was payable annually per capita. The release clearly applied to this interest, and no claim has been made for such

diversions, though the record shows that $249,731.88 of said interest was thus diverted and that but $31,599.68 of said total was disbursed for Seminole Indians (R. 28-29). The amounts claimed herein were required by treaty to be disbursed by the United States for the support of schools, agricultural assistance, and smiths and smiths shops. These amounts were to be paid for from funds of the United States, and not from funds of the Seminole Nation. Furthermore, a large part of this claim was due and owing before the Civil War period and would not be covered by the release which provided for settlement of damages and claims growing out of the Civil War period.

As the lower court pointed out in its first opinion (82 C. Cls. 135, 146-147):

> "The release stipulated in article VIII of the treaty of 1866, insofar as it relates to the diversion of Seminole funds by the Secretary of the Interior during the War of the Rebellion, covers only the diversion of annuity payments. As to these funds the Seminole Nation ratified and confirmed 'all such diversions of annuities heretofore made from the funds of the Seminole Nation by the United States.' The United States had diverted the sum of $249,731.88 of Seminole moneys during the period of the Civil War—from the fiscal years 1862 to 1866—an amount largely in excess of the amount of annuity funds diverted. Had the release been intended to ratify and confirm the diversion of other than the annuity payments, we think such intention would have been expressly stated. The general language, 'The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late Rebellion', has no application and cannot be held to include this item of the Seminole claim for the reason that substantially the whole amount claimed was due and unpaid before the outbreak of the war and consequently is not one for 'damages and losses growing out of the War of the Rebellion.'"

We submit that of the two conflicting decisions the former one is correct as to this item of the claim. In that decision the court sums up the whole matter as follows (82 C. Cls. 133, 147):

"The simple facts are that the United States covenanted with the Seminole Tribe in article VIII of the treaty of 1856, as a part of the consideration for the treaty, to provide annually for them for a period of ten years fixed sums for the support of schools, for agricultural assistance, and for the support of smiths and smith shops among them. In the absence of subsequent specific enactment by Congress to the contrary, the United States was obligated to disburse the funds stipulated in the manner and for the purposes designated in the treaty. The United States failed to discharge this treaty obligation in full, having disbursed only a part of the amount for the purposes named in the treaty. The plaintiff tribe is entitled to recover the undisbursed balance of $61,563.42."

Item 2.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, provided that the United States invest for the Seminole Nation:

"* * * the sum of two hundred fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity: * * *"

The combined Seminole fund was thereafter set up and interest thereon was paid by Act of March 3, 1859, c. 79, 11 Stat. 409.

Although the interest of $25,000 was annually appropriated by Congress to fulfill this treaty obligation, yet during the period from 1867 to 1909, there were underpayments as follows (82 C. Cls. 135, 140, 148-150):

1867	$12,500.00	1874	$14,101.58
1868	450.00	1876	24,500.00
1869	.25	1879	454.00
1870	5,321.00	1907	12,500.00
1871	12,500.00	1908	25,000.00
1872	12,625.45	1909	25,000.00
1873	12,599.00		

In the first decision the lower court held that petitioner was entitled to recover for underpayments in the amount of $154,551.28. (82 C. Cls. 135, 148-150.) In the second proceeding the court found that the following amounts were not disbursed for the treaty purpose but were nevertheless disbursed for the benefit of the Seminole Nation, and at the request of the Seminole council:

1870	17,821.00
1871	12,500.00
1872	12,500.00
1873	12,500.00
1874	11,101.64

and reduced the amount of recovery to $13,501.10 (R. 25).

The lower court clearly was in error in allowing the above credits for the reason that these amounts admittedly were not disbursed for the purpose named in said treaty. The record herein, which was before the lower court and called to its attention, shows that the amounts of $17,821.00 and $11,101.64 were disbursed in 1870 and 1874, respectively, for payments to individuals purporting to have claims against the Seminole Nation and for payment of drafts on the Seminole Nation. (R. 46). Said Article 8 specifically guarded the Seminole Nation against such payments as follows:

> "but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws."

The record shows that the Seminole officials would create claims in favor of themselves by calling councils on any pretext and voting themselves fees, all of which were of no benefit to the Seminole Nation (R. 61, 62-64). In this manner these officials would retain to themselves the tribal annuities to the exclusion of the other members of the tribe. In the face of this record, the lower court in its last opinion allowed the above credits against this treaty obligation.

The purported payments of $12,500 each made in the fiscal years 1871, 1872 and 1873 were disallowed by defen-

dant's own disbursing officers and were *never allowed as proper disbursements against this treaty obligation.*[1] Notwithstanding this fact the lower court allowed such amounts as a credit against said treaty obligation.

The requests of the Seminole council that the United States pay this money to the tribal officers instead of per capita as required by the treaty would furnish no excuse for disregarding this treaty obligation and Section 2097 of the Revised Statutes. These requests of the Seminole officials were denied by the Commissioner of Indian Affairs and the Secretary of the Interior because they were not convinced that the Seminole Indians would get the benefit of this money if turned over to the tribal officers (R. 61-62). It had been reported to the executive officers of the United States that the Seminole chiefs were stealing this money from the other members of the tribe in the manner above outlined (R. 62-63). Such requests of the Seminole tribal officials to have the tribal moneys turned over to them so as to permit them to "gobble up" the annuities due the tribe, and rob the other members of their share, which requests were denied by the executive officers of the United States clearly would be no defense to these illegal payments. Neither would it furnish a justification for the lower court in allowing such credits, nor support a finding that the Seminole Nation got the benefit of this money. As the lower court pointed out in its former decision (82 C. Cls. 135, 149):

> "* * * Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court under the jurisdictional act is without authority to offset against the plaintiff's claim."

[1] This statement is equally applicable to the situation before us, as the Act of August 12, 1935, c. 503, 49 Stat. 571, 596, provides "That funds appropriated and expended from tribal funds shall not be construed as gratuities." The Conference Report on the above bill (H. Rept. No. 1715, 74th Cong., 1st Sess., p. 8) states the intent of Congress in making this exception as follows: "expenditures from tribal funds are not to be considered as gratuity expenditures."

That the amounts due on this treaty obligation were turned over to the United States agent in the fiscal years 1907-1909, inclusive, under the authority of the Act of April 26, 1906, c. 1876, 34 Stat. 137, would not relieve the United States of its treaty obligations, unless it is shown that said agent paid said amounts per capita for these years.

We submit that the former decision of the lower court is the correct one to be followed as to this item.

Item 3.

Article 3 of the Treaty of March 21, 1866, 14 Stat. 755, provided in part as follows:

> "The balance due the Seminole Nation after making said deductions, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to-wit: * * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools."

This item claimed by petitioner was limited to the allowance made by the lower court in the first proceeding. Although the amount of $2,500 was annually appropriated from 1867 to 1874, inclusive; yet $16,902.80 only was disbursed for this treaty purpose, leaving a balance of $3,097.20 due during this period. During the period 1875 to 1898 this annual payment was made to the Seminole tribal treasurer without authority of law and in violation of the treaty provision, and in 1907 the amount of $750.00 was paid to the United States Agent under authority of the Act of April 26, 1906, c. 1876, 34 Stat. 137. The lower court in its decision of December 2, 1935 rendered judgment for the above amounts, in all $61,347.20, for the reason that such payments were not made in accordance with the treaty provision (82 C. Cls 135, 150-152).

In its last decision the lower court permitted recovery of $3,097.20 only, even though said other amounts were not

disbursed in accordance with the treaty, and notwithstanding the fact that such disbursements were not authorized by law. The reason given is that the tribal officials disbursed $7,590 annually for schools; this in the face of the record showing the wrongful manner in which the tribal officers were using the tribal funds. Clearly this reasoning of the lower court would not relieve the United States of the obligation to disburse this money for schools, in accordance with this treaty provision.

The sole excuse for such illegal payments was given in the first proceeding, that of the Act of April 15, 1874, c. 97, 18 Stat. 29.[2] The Court therein pointed out in its decision that said Act of 1874 did not apply to Treaty of March 21, 1866 funds, but was expressly limited by its terms to Treaty of August 7, 1856 funds (82 C. Cls. 135, 151-152).

We submit that the lower court was correct in its first decision and that it was not justified in its second decision in disregarding this treaty provision, or Section 2097, with respect to these treaty disbursements. There is no showing that the United States disbursed this amount for schools and in the absence of such a showing we submit that the petitioner is entitled to recover on this item of its claim.

Item 4.

Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided as follows:

> "Inasmuch as there are no agency buildings upon the new Seminole reservation it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the Superintendent of Indian Affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands upon which said agency buildings shall be directed (erected), which land shall revert to said nation when

[2] This Act became effective on April 2, 1879 (R. 69).

no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated."

By the Act of July 28, 1866, c. 296, 14 Stat. 310, 319, Congress appropriated $10,000 to fulfill this treaty obligation, but this amount was returned to surplus. By Act of May 18, 1872, c. 172, 17 Stat. 122, 132, Congress again appropriated $10,000 to fulfill this treaty obligation, $9,030.15 of which was disbursed for some other unknown purpose, and $969.85 was returned to surplus. In 1870 and 1872 an amount of $931.76 was expended from general appropriations for agency buildings and repairs (R. 15).

In its first decision of December 2, 1935, the lower court gave judgment for $9,068.24, which represented the difference between the $10,000 appropriated by Congress for this treaty purpose and the $931.76 disbursed from general appropriations for agency buildings and repairs (82 C. Cls. 135, 152-153). In its second decision the lower court denied recovery upon the assumption that an agency building was erected on the Seminole reservation in 1873, and cited the report of the Commissioner of Indian Affairs for 1873, pp. 211-212, as evidencing this fact. This report shows that some sort of agency building was in the process of *being* constructed, but there is no showing that this building was ever completed. The sole amount shown to have been spent for this treaty purpose was $931.76, and the United States is entitled to credit in this amount, as allowed in the first decision of the lower court. Clearly the disbursement of this $931.76 was not a substantial compliance with this treaty obligation, especially when Congress definitely fixed the amount of this obligation by twice appropriating $10,000 for this treaty purpose, and the record showed that the estimate for suitable agency buildings made by the United States Agent for the Seminoles exceeded the amount fixed by Congress for this treaty purpose (R. 60-61). Furthermore, the illegal disbursement of said $9,030.15 was not only a violation of the treaty, but also the act of Congress appro-

priating same, and as such would be a plain violation of Sec. 2097 of the Revised Statutes, *supra*.

We submit that the first decision of the lower court with respect to this item is the correct one to be followed herein.

Item 5.

This item of petitioner's claim is based upon the illegal disbursement of Seminole tribal funds in violation of Section 19 of the Curtis Act, approved by Congress June 28, 1898, c. 517, 30 Stat. 495.

The sole question involved in this item is whether the Secretary of the Interior, or Congress, has plenary power over the affairs of an Indian tribe, and whether the Secretary can disburse Seminole tribal funds in direct contravention of a prohibition by Congress against such disbursement.

The basic question was passed upon in *Creek Nation* v. *United States*, 78 C. Cls. 474, 485, in which the court stated:

> "That Congress has plenary power over the administration of Indian affairs is well settled. Cherokee Nation *v.* Georgia, 5 Pet. 1; Cherokee Nation *v.* Hitchcock, 187 U. S. 294; Lone Wolf *v.* Hitchcock, 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined."

Said Section 19 of the Curtis Act provides as follows:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

The purpose of this provision is clearly shown by a review of the events leading up to its passage. We will comment upon them briefly.

Before the Curtis Act the Seminole tribal officials were entrusted with the disbursement of certain of its tribal income, the payments of which were authorized to be made to the tribal treasurer under the Acts of April 15, 1874, c. 97, 18 Stat. 29, and March 2, 1889, c. 412, 25 Stat. 980, 1004.

As early as 1869 it was called to the attention of the executive officers of the United States that the Seminole officials were monopolizing the tribal income. The report of T. A. Baldwin, the United States Agent for the Seminoles, dated Dec. 6, 1869, stated in part as follows (R. 60):

> "I would state that they are in the habit of calling Councils, for any little thing that may arise, and spending from 2 to 15 days without effecting anything whatever, which would be of the least service to the nation, except in expending the funds; which are taken out of those ordered paid per 'capita' to the nation.
>
> "I find that it has been the custom heretofore for the Chiefs to order how the payment should be made, but at the same time making returns to the department, upon rolls as if it had been paid per 'capita'.
>
> "I think that it is an injustice to the majority of the people, comprising this nation and the only way to avoid unnecessary expenditure of money for Councils, etc. which are of but little benefit to the nation, (for example the last council held cost the nation $700.00 for edibles alone and did no business) is for the department to give special orders in reference as to what amount shall be turned over to the chiefs and the balance paid to heads of families in person."

On August 9, 1875, Special United States Commissioner John P. C. Shanks reported to the Commissioner of Indian Affairs that the Seminoles were in bad hands; that the tribal officers create large claims against the nation in favor of themselves, procure a resolution of the council endorsing said claims and issue warrants in favor of themselves for payment from tribal funds (R. 62).

On November 20, 1878, A. B. Meacham, United States Indian Agent for the Seminoles, reported that the Seminole Chiefs were "gobbling" up the annuities due the tribe, and robbing the other destitute members of their just shares; and that "It is a perfect system of Bull-dozing the ignorant in order to live upon them" (R. 64).

In 1889 John F. Brown, Principal Chief of the Seminole Nation, and A. J. Brown, his brother, Seminole treasurer (the same officials who were in charge of Seminole affairs during the period of this claim—1898-1907), and Samuel J. Crawford, Ex-Governor of Kansas and an attorney, embezzled a large amount of money due the Seminole Nation for lands sold under an agreement ratified by Act of March 2, 1889, c. 412, 25 Stat. 980, 1004. The amount was paid to the tribal treasurer, and it vanished from sight, and never reached the Seminoles (Sen. Doc. 105, 55 Cong., 2 Sess., pp. 3-4).

By Act of March 3, 1893, c. 209, 27 Stat. 612, 645, the Dawes Commission was created for the purpose of negotiating with the Five Civilized Tribes for the allotment of their lands and the division of the funds equally among the members of said tribes. The annual reports of this Commission from 1894 to 1898 set forth the intolerable conditions existing within the tribal governments of the Five Civilized Tribes. The report, dated Nov. 20, 1894 (Repts. of Comm. to the F. C. T., H. Ex. Doc. No. 1, Pt. 5, 53 Cong., 3 Sess., pp. LXVIII-LXX, Cong. Ser. 3305), states in part as follows:

> "Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire

property of the Territory of any kind that can be rendered profitable and available.

* * * * * * *

"The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages thus afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments of money to them the Government should make such disbursements to the people directly, through one of its own officers.

* * * * * * *

"Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain. * * *"

In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 451-453, are set forth extracts from these and other reports showing the intolerable conditions existing within the governments of the Five Civilized Tribes, and of the great need of reform.

The manner in which Seminole tribal funds were being disbursed by the Seminole officials had been called to the particular attention of Congress. In 1896, Congressman Flynn, of Oklahoma Territory, endeavored to put a stop to the methods used by Seminole officials in "gobbling up" Seminole annuities, by securing an amendment to the Indian Appropriation Act requiring this money to be disbursed by an officer designated by the Secretary of the Interior. We quote from the proceedings of the House for February 24, 1896 (Cong. Rec., 54th Cong., 1st Sess., p. 2070), as follows:

"Mr. Flynn: Mr. Chairman, I offer the amendment which I send to the Clerk's desk.

"The amendment was read, as follows:

"Insert, in line 15, page 27, after the word 'dollars', the following:

" 'Provided, That the sums of money mentioned in this and the preceding paragraph shall be paid to said Indians by an officer designated by the Secretary of the Interior'.

"Mr. Flynn: * * * The object of this amendment, briefly stated, is this: There are about 2,000 Seminole Indians. The chief is Governor Brown. The treasurer is Jackson Brown, his brother. There are but two stores in the Seminole Nation, both owned by the Browns. This money is paid to Jackson Brown, the treasurer, and the Indians never see a dollar of it, but the Browns issue to the Indians duebills, good for so much in goods at the Browns' stores. The Browns have absolute control not only over the property, but I may say over the lives of these Indians. The Indians must take Browns' duebills for the amount of money that the Government pays them in annuities. I think, in justice to the Indians, in fairness to them this money should be paid by an officer designated by the Department, which will insure the Indians, instead of the storekeeper, getting all the money."

In 1897 Congressman Flynn again commented upon the manner in which Seminole funds were being monopolized by these Seminole tribal officials and on the floor of the House stated as follows (Cong. Rec., Vol. 29, Pt. 2, 54th Cong., 2 Sess., p. 1261):

"Mr. Flynn: * * * If you want the Indians to obtain the money you appropriate for them, then you should see to it that the money is paid by an officer of the United States.

"'It [tribal money] has been sent to the treasurers of the various tribes. If any individual Indian 'coughed up' enough to the officers of the tribe, probably he would get all that was coming to him, or probably he would not.

"This amendment is offered solely in the interest of the individual Indian. I am frank to acknowledge that

it is against the monopoly now existing. As I stated when the amendment was offered and adopted last year, the governor of the Seminole tribe is named Brown, and the treasurer is his brother. They run the only stores in the Seminole Nation. When the money is paid from the Treasury of the United States to the treasurer of the Seminole Nation, the individual Indian never gets a single dollar, but is given a duebill, upon which he can obtain goods to a particular amount at Brown's store."

The Seminole Indians themselves protested to Congress the manner in which their tribal officials were using the Seminole tribal funds. In the protest of January, 1898 (Sen. Doc. 105, 55th Cong., 2nd Sess., pp. 3, 4), the Seminoles stated:

"The national funds of the Seminoles are absorbed by only a few of their citizens who have grown rich at the public expense, and we firmly believe that these few persons are oppressing the poorer ones. * * *

* * * * * * * *

"We beg leave to state further that we have no law regulating the bond of our treasurer or chief, and according to the Seminole law no action or bill can be placed before the council without the consent of the chief. Our laws do not admit of an auditor, and our people are entirely ignorant of the condition of our finances. Therefore, in conclusion, we desire to say that while the legislation has not been in line with our wishes, we must perforce of circumstances accept the inevitable. We ask that any disposition of moneys belonging to the Seminoles and the management of their schools be made with the approval of the Secretary of the Interior. * * *"

Awakened by these reports to the urgent need of reforming the then existing evils prevailing in the Indian Territory, both the executive and legislative branches of the United States Government combined to accomplish one general scheme or purpose—that of ridding the Indian Territory of these corrupt practices within the tribal governments by transferring the administration of the tribal prop-

erty from the tribal officials to the officers of the United States, in order to insure to all the members of these tribes an equal share of the tribal estate.

The Curtis Act and the succeeding agreements with the Five Civilized Tribes had for their purpose the creation of correct membership rolls of these tribes, the allotment of their lands in severalty, the sale of the surplus lands, the equalization of allotments, the per capita distribution of the remaining tribal funds, and the final winding up of the tribal affairs and the ultimate dissolution of the tribal governments. As a part of this comprehensive general program Section 19 of the Curtis Act forbade payments of tribal moneys on any account whatever to the tribal officers for disbursement.

The Original Seminole Agreement, ratified by Act of Congress approved July 1, 1898, c. 542, 30 Stat. 567, provided generally for the enrollment of citizens and allotment of lands in severalty, the equalization of the value of allotments, and the per capita payment of funds not used for said equalization of allotments, *to be paid by a person appointed by the Secretary of the Interior.*

Let us impress upon the Court that the Curtis Act and the agreements made with the various tribes were but a part of a single legislative scheme, worked out by the same officials, practically at the same time, and for the same purpose—that of preventing the robbery of the private citizens of the tribe by the crooked tribal officials, and the transferring of the administration of the tribal property and funds from these corrupt tribal officials to the United States Government.

However, as soon as the Curtis Act and the Seminole Agreement became effective the Seminole tribal officials sought to avoid them, and again employed Samuel J. Crawford to represent them. These officials and their attorney raised the question as to whether or not Section 19 was repealed by the Seminole Agreement. The Secretary of the Interior submitted the question to the Assistant Attorney General for the Interior Department, Willis Van De-

vanter, later Mr. Justice Van Devanter of the United States Supreme Court, who held that (82 C. Cls. 135, 157-158):

> "I have therefore to advise that Section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said that whether that act applies or not, the manner of disbursement under the Seminole act must be the same."

The Seminole officials then had the Van Devanter opinion withdrawn and had the question transferred to the Comptroller of the Treasury for decision. The Comptroller held that Section 19 did not apply to the Seminole Nation. The fallacies of the reasoning in this opinion are pointed out by the lower court in its decision of December 2, 1935, 82 C. Cls. 135, 157.

The Secretary disregarded the Van Devanter opinion and followed the Comptroller's opinion, and thereafter continued to turn Seminole tribal moneys over to the Seminole officials in violation of Section 19, until Attorney General Bonaparte put a stop to this manner of paying Seminole funds in an opinion involving the right of the Seminole officials to disburse Seminole funds under the provisions of the Act of April 26, 1906, c. 1876, 34 Stat. 137. (See 26 Op. Attys Genl 340).

The Seminoles themselves wondered why their funds were not being disbursed by an officer of the United States. Their delegate wrote the Commissioner of Indian Affairs as follows (R. 64):

> "A few years ago through your efforts a Bill was passed by Congress making the Seminole Annuity payable by the U. S. Indian Agent. This gave great satisfaction to all the tribe except the official class who through the representation of the Governor (Brown) that their salaries would cease to be paid, opposed it by a petition of his get up. Then for some reason to us unknown this law was set aside and the annuity has been paid through his manipulation and entirely to his wish. * * * They, the tribe, of course would like some say in the disposition of the funds. Can you give us

any information on the subject and have we any recourse to have the law executed?"

During the whole period of petitioner's claim (1898-1907), and for many years before, the affairs of the Seminole Nation were under the control and domination of two brothers, John F. Brown, Principal Chief, and A. J. Brown, Seminole Tribal Treasurer. These officials were intelligent half-breed Indians. The Browns and C. I. Long (a white man) owned and operated a business enterprise known as the Wewoka Trading Company. By means of a credit system, worked out through this company, the Browns "gobbled up" all of these Seminole annuities. Of all the moneys appropriated by Congress for the Seminoles the Indians would never see a dollar of it. Several months before the annuities were due from the Government, the Browns would require the Seminoles to accept scrip in the amount of the per capita due, entitling each holder to credit at the Wewoka Trading Company. Before the Indian received this scrip the Browns deducted a big per cent for interest, or a discount (R. 65-67). When the money was paid by the United States to A. J. Brown, Seminole Treasurer, the Browns would rake it all over into the tills of the Wewoka Trading Company. The Indians were required to go to Brown's store to redeem the scrip in goods. In many instances, not knowing what the scrip represented, the Indians threw it away. In this manner the Browns kept the Seminoles perpetually in debt to them, and thus were able to secure to themselves the Seminole annuities (R. 65-67).

The Seminole Treasurer was administrator in a payment of moneys due the Loyal Seminoles made during the period of our claim. Special Assistant United States Attorney P. L. Soper, in objecting to the approval of A. J. Brown's account by the Court, recommended that Brown be required to repay amounts deducted from shares for the Wewoka Trading Company and Samuel J. Crawford for an illegal attorney fee (the same Crawford who was involved in the 1889 steal, and who fought for the Browns to avoid the application of Section 19 as to the Seminole funds).

Mr. Soper reported that A. J. Brown, Seminole Treasurer and Vice President of the Wewoka Trading Company, did not pay the amounts due the Seminoles in cash but acted as collector for said company, deducting from the shares amounts due said company and an illegal attorney fee, and then reported that said amounts were paid in cash (R. 64-65). He further states (R. 65):

> "The testimony shows that books were issued and given to each claimant, containing a certain credit, upon which interest was charged from the beginning. Thus no record was ever kept of the nature, character and kind of goods, wares and merchandise each person obtained and the price paid for same. With adults this might not matter, but with minors it is of the utmost importance, especially taking into consideration the state of intelligence of the claimants, and especially the majority of those who testified before your Honor."

In commenting upon the above payment, Mr. Henry C. Lewis, an Investigator of the Department of Justice, expressed the view that the system of credit used by the Wewoka Trading Company was dishonest. When transmitting the report of Mr. Lewis to the Secretary of the Interior, the Acting Attorney General quotes from the report in part as follows (R. 65-66):

> "It may not be inappropriate to make one or two observations upon this system of credit. * * * To charge a discount where goods are given on credit is not unusual, but the system under which it is charged by this company is manifestly unfair, for the reason that when the money is received by the Trading Company the Indians may not have traded out all of the due bills which have been given them, or, in other words, all of the credit extended to them. The result is that a discount has been charged on a part, at least, of the amount given out in due bills, goods for which have not been obtained, while as a matter of fact, the Trading Company has the money in its possession representing such part for which goods have not been obtained, the Indians retaining the remaining due bills to be traded out in the future. It would seem that there should be a discount in favor of the Indians instead of the Trading Company. The Indians are at liberty to turn in

the remaining due bills, states Mr. Brown, but they never do so, another result of their pitiable ignorance. Indeed, some of them do not even understand what these due bills represent when they receive them. There is in the record the testimony of one girl who stated that she did not know what the due bills were and threw them away. In point of fact, she threw away so much money. It is not too much to say that, in view of the ignorance of these Indians, this system of credit is dishonest. It should be condemned because it keeps these Indians in a constant state of poverty. They do not realize that these due bills are in fact money, and the result is that they are squandered without care. I am not informed as to whether the Department of the Interior has knowledge of this state of affairs. It should be brought to its attention, so that, if possible, it may take steps looking to the breaking up of the system, which can be done by having the appropriations distributed in some other manner."

In 1916, Wm. L. Bowie, Special Investigator of the Department of the Interior, reported that the Browns were using their official positions to "advance their personal interests at the expense of the Indians under their authority" (R. 68). This report states in part as follows (R. 67):

"Governor Brown and his brother have been in the mercantile business in the Seminole Nation for many years. It is a fact much commented upon by those acquainted with Seminole tribal affairs that for a number of years Governor Brown held the dual relationship to the members of the Seminole tribe of governor and paymaster on the one hand, and Indian trader on the other hand. As governor, he issued the tribal scrip, and, as Indian trader, he held this scrip, requiring the Indians to whom it was issued to endorse it over to him, in payment of merchandise accounts, or for goods to be purchased by them. In this way the Browns monopolized the Indian trade, and it is stated that if it had not been for poor business judgment used by them in speculation and in bad business ventures; that they would be in splendid financial condition. * * * In recent years, they have been losing the Indian trade, and reliable persons have advised me that Governor Brown has been gradually losing the confidence of the members of his tribe."

The Interior Department officials called the Brown matter under investigation "the rawest graft deal" with which they had ever come in contact, and suggested that the only way to deal with "these tiger shore sharks" was to call for the resignation of the Browns (R. 68). This was done on September 22, 1916, and thus the curtain fell on Browns' activities (R. 69).

From this whole record it is evident that the so-called Seminole Government was of the Browns, by the Browns, and for the Browns, and the poor helpless Seminoles got little or nothing of the tribal annuities turned over to the Browns. It is a well known axiom that no man can serve two masters, and we have seen that the Browns, in their dual capacities as officials of the tribe and Indian traders, served but their own personal ends at the expense of the more ignorant and poorer members of the Seminole tribe.

Chief Justice Cardozo, speaking for the Court of Appeals of the State of New York, in *Meinhard* v. *Salmon*, 164 N. E. 545, 546, said:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

Can it be said that the Seminoles got the benefit of the tribal moneys turned over to these officials in violation of Section 19 of the Curtis Act? And were these officials honest?

In the well considered first decision of the lower court judgment was rendered in favor of the Seminole Nation for

$864,702.58 representing the Seminole tribal moneys turned over to the Seminole officials in violation of Section 19 of the Curtis Act. The court said (82 C. Cls. 135, 156-158):

> "The undoubted purpose of this provision was to forever put an end to the intolerable conditions brought about by permitting the tribal governments to receive and disburse tribal moneys due them from the United States. It was to prevent unscrupulous tribal officers and corrupt designing persons associated with them from diverting to their own use and profit tribal funds, the common property of the tribe, and to insure that all members of the tribe would receive an equal share in the distribution of such funds. No more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection, however, was not afforded them, and a continuation of the 'irreparable wrongs and outrages upon a helpless people' was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer.
>
> * * * * * * *
>
> "The Secretary of the Interior was therefore without legal authority to pay Seminole tribal funds into the Seminole tribal treasury. More than that he was plainly prohibited by law from doing so."

In its last opinion the lower court held that Section 19 applied to the Seminole Nation, but limited its meaning to a prohibition against turning over Seminole tribal moneys to the tribal officers for per capita payments only, and denied recovery on this item of petitioner's claim. The lower court said (R. 29):

> "Except for the second clause of this section, it is perhaps true that the Act would have prohibited the payment to the tribal treasurer of all sums of whatever character and for whatever purpose they were to be used; but the word 'but' in the beginning of the second clause connects the second clause to the first and shows that Congress had in mind only the payments due to members of the tribe."

The Court further states (R. 29) that the meaning of the first clause of the paragraph "is modified by the following one."

Let us analyze the grammar of this section to determine whether or not this is correct. The first clause expresses an entirely different thought from the second clause, and reads as follows:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement."

The second clause expresses another independent thought, and reads as follows:

> "* * * payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him;"

These two independent thoughts are joined by the word "but", appearing in the second clause before the word "payments." In "Advanced English Grammar," by Kittredge and Farley (Ginn & Co.), p. 152, the word "but" is given as one of the chief coordinate conjuctions; and at p. 151, *supra*, it is stated:

> "A coordinate conjunction connects words or groups of words that are independent of each other."

Given two independent clauses, one could not modify the other; and, the coordinate conjunction "but" being used by Congress to connect these two independent clauses, the first clause could not modify the second clause. Therefore, Congress clearly intended that the first clause stand alone and prohibit all payments of any tribal moneys on any account whatever to the tribal officers for disbursement; and that the second clause direct that all disbursement of tribal moneys be made by the United States or an officer thereof; and that the third clause provide that per capita payments be made directly to each individual member of

the tribe, without becoming liable for any previously contracted obligation.

In holding that Section 19 applied to Creek funds, Assistant Comptroller Mitchell, in his decision of August 30, 1898, 5 Comp. Dec. 93, 96, stated:

> "There does not seem to be room for serious doubt as to the meaning of the opening lines of section 19 of the act of June 28, 1898, supra. They import a plain, unqualified, and comprehensive prohibition of all payments by the United States to the tribal governments, or any officer thereof, on any account whatever for disbursement. Had the intent been simply to provide for payments to members of the tribes, either per capita or otherwise, by a disbursing officer of the United States the prohibition found in the first three lines was unnecessary. * * *"

It is impossible to reconcile the lower court's last holding with the history of this legislation, as heretofore outlined. The whole purpose of the first clause of Section 19 was clearly, and we think correctly, set forth in the lower court's former opinion from which we have quoted, *supra*, p. 37.

Furthermore, the manner of disbursing Seminole tribal moneys under Section 19 and under the Seminole Agreement, approved by Act of July 1, 1898, c. 542, 30 Stat. 567, was the same, as pointed out in the court's former opinion (82 C. Cls. 135, 157).

The claim under consideration does not involve a payment to the tribe a second time, but the proper payment of this money a first time. Under Section 19 the Seminole tribal officers could not represent the tribe in the receipt and disbursement of the tribal funds. By failing to follow the plain directions of Congress, the Secretary of the Interior paid the wrong parties and the United States is now liable to the rightful owner of said funds. In *Burnell* v. *United States*, 44 C. Cls. 535, 548, the court stated:

> "Hence, the general rule that a trustee is bound, at his peril, to see to the proper application of the trust fund applies to the government as well as to an individual trustee. (Borcherlin's Case, 35 C. Cls. R.

312, which was affirmed by the Supreme Court, 185 U. S. R. 223). It must, therefore, be apparent that if the treasury department in the case at bar made payment out of a fund which it held in trust, through a mistake of law, to the party in law not entitled to receive the same, it transcended its authority and is responsible therefor to the rightful owner of the funds."

The lower court in its last opinion (R. 30) states:

"But although the Curtis Act did prohibit the making of these per capita payments to the tribal treasurer, and they were so made in violation of its terms, still we do not think the tribe is entitled to recover. The passage of the Curtis Act did not create in the individual Indians any vested rights. It does not amount to an agreement with the tribe for the benefit of its individual members. It was merely a direction to the agents of the United States. The Sac and Fox Indians, supra."

This statement of the lower court overlooks the fact that the Seminole Nation, and not individuals, is party plaintiff in this suit, and that the tribe is suing for annuities due the tribe which were paid to the wrong parties. The *Sac* and *Fox* case, 220 U. S. 481, cited in support of this statement has no application to the question now before us. In that case no question of a deliberate disregard of an Act of Congress by the Secretary of the Interior was involved, but this Court held that the Secretary had implicitly complied with the directions of Congress in paying the tribe its tribal annuities.

A careful analysis of the decision of this Court in the *Sac* and *Fox* case shows clearly that a *small band of individuals who had severed their connections with the tribe* sued the tribe for a part of the tribal annuities claimed to be due said band, contending that the Secretary of the Interior had not followed the directions of Congress enacted for its benefit. This Court simply held that a direction to the disbursing officers of the United States providing how *tribal* annuities should be paid to the *tribe* would not give said

band of individuals a vested right in tribal *annuities;* that the tribe, and not said band of individuals—who were not members of the tribe—had a vested right in tribal annuities; and also that the Secretary of the Interior had followed the directions of Congress in disbursing the tribal annuities.

In the case at bar the tribe is suing the United States for annuities due it by virtue of its treaties and agreements with defendant, which annuities were not paid to the *tribe* because of the failure of the Secretary of the Interior to follow the plain directions of Congress providing the manner of the payment of same to the tribe, and enacted expressly for the purpose of insuring to the tribe the benefit of its tribal annuities. Both decisions of the lower court hold that Section 19 was violated. However, in its later decision denying recovery for this violation, the lower court overlooks the principle that Congress has plenary power over the affairs of an Indian tribe.

The main question before the court is whether the Secretary of the Interior, or Congress, has plenary power over the affairs of an Indian tribe. In *The Creek Nation* v. *United States*, 78 C. Cls. 474, 491, the court in passing upon this question stated:

> "* * * To hold that the Secretary of the Interior had the legal right to expend such funds, in the face of positive prohibition against their expenditure without specific appropriation would be equivalent to holding that the Secretary of the Interior, not Congress, had full administrative control and power over the property of the plaintiff tribe. * * * Such payments were not only made without authority of law but were made in contravention of positive provisions of law. * * *"

For the reasons stated above, we submit that the lower court was correct in its decision of December 2, 1935, 82 C. Cls. 135, wherein it held that Section 19 of the Curtis Act prohibited payments of all tribal moneys to the tribal officers "on any account whatever" for disbursement; that the manner of disbursement of tribal moneys under Section

19 and under the Seminole Agreement was the same; that Congress, and not the Secretary of the Interior, has plenary power over Indian Affairs; and that the United States is liable to the Seminole Nation for the failure of the Secretary to follow the plain directions of Congress as to the disbursement of Seminole tribal funds to the tribe.

Gratuity Offsets Allowed by the Lower Court Finding 10 (R. 16).

Before discussing the other items of gratuity offsets allowed by the lower court under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, we desire to call the court's attention to an item of offset in the amount of $165,847.17, which was allowed against petitioner by the lower court.

Our position with respect to this item is that it involves no element of gratuity, but constitutes an element of reparation, in that the disbursement was made to correct the Government's own error in locating the Seminoles on the wrong lands, and to settle the Government's own liability for improvements made thereon by the Seminoles.

The claim of respondent for $175,000 arises out of a provision contained in the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, authorizing payment to the Creek Nation of $175,000 for 175,000 acres of Creek lands purchased by the United States for the Seminoles. The history of the acquisition of said 175,000-acre Seminole tract is as follows:

By treaty of June 14, 1866, 14 Stat. 785, the Creek Nation ceded to the United States the west half of its entire domain, and retained the east half as its permanent national domain. Said lands were "to be divided by a line running north and south" (Article 3). By Treaty of March 21, 1866, 14 Stat. 755, the Seminole Nation purchased as its national domain 200,000 acres of the lands to be ceded by the Creeks, immediately west of and adjoining said Creek "dividing line."

Because of the homeless condition of the Seminoles growing out of the Civil War (they having been driven into

Kansas as refugees)—*before said Creek "dividing line" was established*—the officers of the United States removed them to and placed them upon what was believed to be the new 200,000-acre national domain granted to them in said Treaty of March 21, 1866, and respondent's officers encouraged them to settle down and make improvements as rapidly as possible (R. 72).

When this treaty was executed the Seminoles were promised that their new domain would be surveyed in the fall of 1866, but this was not done (R. 72).

In 1868 the first attempt was made by the United States to survey the Creek "dividing line" which was also to be the eastern boundary of the Seminole 200,000-acre tract. Under direction of the Commissioner of Indian Affairs, one Rankin, in 1868, surveyed this line. The Seminoles were shown the Rankin line by defendant's officers, and were told that this was their eastern boundary, and those who were located east thereof were moved west of this line (R. 72).

However, the Creeks objected to this survey, claiming that said line had been run too far east. The Seminoles became alarmed at the prospect of being forced to move again, but were assured by respondent's officers that they would not be disturbed even if the Rankin survey were found to be erroneous, and that they would be protected in their improvements (R. 72-73; Sen. Ex. Doc. No. 126, 51st Cong., 1st Sess., p. 2).

The Rankin survey was found to be erroneous and was not approved, but no immediate steps were taken by respondent to correct this error or to establish the correct Creek "dividing line" (Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 5; R. 73).

Finally, in 1871, the Creek "dividing line" was resurveyed and established by Frederic W. Bardwell, and this survey was approved on February 5, 1872. This Bardwell line was placed 7 miles west of the Rankin line, and the large area between the two lines, then estimated at 175,000 acres, and occupied by the Seminoles, was thrown within the boundaries of the Creek Nation. During the four-years

interval between the Rankin and Bardwell surveys the Seminoles had occupied this area believing, and being assured by respondent's officers, that this was a part of their new national domain, and had built homes and made other extensive and valuable improvements on these lands (Sen. Ex. Doc. 126, 51st Cong., 1 Sess., p. 9).

Disputes between the Creek and Seminole Nations soon arose over the jurisdiction of this area, and the Seminoles were much discouraged over the prospect of having to move again and reestablish their homes. As the United States Agent for the Seminoles stated in his report to the Commissioner of Indian Affairs, dated September 25, 1872 (1872 Rept. Comr. Ind. Aff., p. 241):

> "It is to be hoped that the Seminoles will be protected in their just title to their present homes, and that the Government will urge upon the Creek authorities a speedy settlement of the disputed title of the Seminoles to the lands upon which the Government placed them, and which they have improved with more assiduity and care than their neighbors. Many of them are still in doubt whether their lands and improvements will be secured to them, and this uncertainty in this class of Indians is exceedingly discouraging and rests like an incubus upon their energies and labors.
>
> "The Seminoles do not feel, and, I think, very justly, that they are a party in the settlement of this matter, excepting as a protesting party against their removal from this to a new country. They say that they purchased of the United States Government a certain amount of land, adjoining the Creek country on the west; that the Government showed them their boundaries, and located them, and told them this was to be their future home, and for them to go to work and improve it, and they have done so in good faith, and they are now happy and contented. And if their improvements have been made upon Creek soil, which is evidently the fact, the Government, and not they, is responsible, and they look to the Government to secure them in their rights and protect them in their present homes."

And as the Commissioner commented to the Secretary of the Interior in this same report, pp. 36-37, as follows:

> "* * * A cause of discontent and just complaint on the part of this people is found in the fact that the Government, in providing them a new home, after the cession of their reservation under the treaty of 1866, misled them as to their boundary-line, so that many have settled beyond the line, upon territory still belonging to the Creeks, and have there established themselves in comfortable homes and upon lands which they have very much improved. The Seminoles so situated are troubled and discouraged, having no security as to their *possession of the lands* and improvements thereon, so occupied. As the mistake was not theirs, they look to the Government to adjust the matter with the Creeks, and to secure them in their rights and in the possession of their present homes. The Department has the matter under careful advisement, and will earnestly seek to avoid any unfortunate issue of the complication. So soon as the best method of saving at once the rights of the Creeks and the equities of the Seminoles shall be determined, Congress will be asked to provide the requisite authority for the adjustment of the question."

Accordingly Congress, by Act of March 3, 1873, c. 322, 17 Stat. 626, authorized negotiations with the Creek Nation for the cession of 175,000 acres of its domain, the respondent believing that such a purchase would cover all of the Creek lands then occupied and improved by the Seminoles.

On February 14, 1881, the Creek Nation ceded to the United States 175,000 acres of its national domain for $175,000, and by Act of August 5, 1882, c. 390, 22 Stat. 257, 265, Congress appropriated $175,000 for said lands, which amount was paid to the Creek Nation. (See *Creek Nation* v. *United States*, 93 Ct. Cls. 561, 562-563).

In reporting on this purchase, and submitting a draft of the legislation necessary to rectify this matter, Acting Commissioner of Indian Affairs, Thos. M. Nichol, wrote the Secretary on February 18, 1881, as follows (Sen. Ex. Doc. No. 75, 47th Cong., 1 Sess., p. 7, Cong. Ser. 1989):

"As shown in the foregoing, the homeless condition of the Seminoles, and their unwelcome occupation of lands belonging to another tribe, as well as the necessity of settling them somewhere as soon as possible, in order to enable them to commence to support their families, led the Government to locate them on what, at the time, was supposd to be the land that would enure to them, when the 'dividing line' should be surveyed, but which, upon the correct survey of the line, was found to be included in the Creek reserve. That they were thus erroneously located, is under the circumstances, not to be wondered at, but certainly it was through no fault of the Seminoles, and the Government should therefore pay the Creeks for the lands sought to be purchased, and should also meet the expense of the survey thereof. The Seminoles certainly should not be required to do this, especially when it is considered that they received only fifteen cents an acre for the country relinquished by them in the treaty of 1866, while the United States paid the Creeks thirty cents per acre for the half of their domain ceded to the United States, and then charged the Seminoles fifty cents an acre for the part of the same land sold to them, and only after the lapse of nine years made up to them the difference in price."

The eastern boundary of the 175,000-acre tract was surveyed in 1888 by respondent's officer, H. C. F. Hackbusch. Concerning said east boundary, said Hackbusch reported as follows (*Creek Nation* v. *United States*, 93 Ct. Cls. 561, 570-571):

"This line (the east boundary of the Seminoles), in accordance with special instructions, was run so far east of the Creek Dividing Line as to include an area of 175,000 acres. But the one hundred seventy-five thousand acres do not embrace all the lands now occupied by the Seminoles. Some valuable property remains east of the east boundary, such as the store and post office at We-wo-ka, the We-wo-ka mission; the store and post office at Arleka and several homesteads of the Indians. As near as I can estimate, not having a positive knowledge, it will take about twenty-five thousand acres more or less to include all the property of the Seminole Indians, which now remains east of the east boundary, as surveyed by me, under my contract of June 26, 1888."

Thus the respondent just partially corrected said errors.

It later developed that still another error was made by defendant. Due to an error in the survey of the east boundary of said 175,000-acre tract, in 1888, 176,198.99 acres were included in said tract, or an excess of 1,198.99 acres, for which the Creek Nation received no compensation. (See *Creek Nation* v. *United States*, 93 Ct. Cls. 561, 563.)[3]

In working out this offset claim against petitioner the lower court mixes up the acreage of the 200,000-acre Seminole tract with the acreage of the 175,000-acre Seminole tract, deducts an 11,550.94-acre shortage on the west side of the 200,000-acre tract from an excess of 2,397.71 acres purportedly received by the Seminoles in the 175,000-acre tract, and determined that the difference of 165,847.17 acres at $1 an acre, or $165,847.17, was a gratuity offset against petitioner. Clearly an excess of acreage in the 175,000-acre tract has no connection with a shortage of acreage in the 200,000-acre tract. Different treaty provisions and acts of Congress and principles of law, different lands and consequently different values are all involved, and we submit that such an attempted settlement is most improper.

The sole question is whether respondent is entitled to a gratuity offset for the $175,000 paid for 176,198.99 acres[4] of lands purchased from the Creeks for the Seminoles under the circumstances outlined above. We have seen that the United States removed the Seminoles to what was believed to be their new national domain before the Creek "dividing line" was surveyed, and encouraged them to make improvements as rapidly as possible; then led them to be-

[3] The lower court states that the Creek Nation was paid $177,397.71 for 177,397.71 acres of lands included in the 175,000-acre purchase (R. 16). A mere reference to the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, shows that the Creek Nation received just $175,000 for this land. Also in *Creek Nation* v. *United States*, 93 Ct. Cls. 561, 563, the Court found that the Creek Nation received no compensation for the excess of 1,198.99 acres included in this tract, and therein the Creek Nation was not permitted to recover compensation for this acreage.

[4] See *Creek Nation* v. *United States*, 93 Ct. Cls. 561, 569, for these acreage figures.

lieve that the Rankin line was the correct dividing line, and promised them that if it were not correct, the United States would protect them in their improvements; and that in reliance upon these promises the Seminoles in good faith continued to make improvements on these lands. When the correct "dividing line" was established and it was determined that the United States had erroneously located the Seminoles on Creek lands, the Government made good its promise to the Seminoles in part only. We submit that under these circumstances said 175,000 was disbursed by respondent to correct its own errors, and to carry out its promises to the Seminoles, and therefore this amount would not be a gratuity offset against petitioner.

Furthermore, we believe that rather than being an element of gratuity this item is merely an element of reparation. The improvements which the Seminoles had made upon these lands were very valuable. In Sen. Ex. Doc. No. 126, 51st Cong., 1st Sess., p. 2, the Secretary of the Interior stated that the Seminoles had valuable improvements on this Creek land. On page 3 thereof the Commissioner of Indian Affairs stated that the Seminoles had "made for themselves homes and valuable improvements" on the land. On page 6 thereof the Seminole delegates state "The homes and improvements of the Seminoles are worth vastly more than the lands upon which they are situated will cost." On page 9 thereof Assistant Attorney-General, Geo. H. Shields, stated that "nearly all of the extensive improvements made by the Seminoles since their settlement on the land, * * * and also the agency buildings," were on this Creek land. In Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 6, Acting Commissioner of Indian Affairs, Thos. M. Nichol, stated that since the fall of 1866 the Seminoles had "made for themselves homes and very valuable improvements" on these lands.

We submit that in the absence of proof to the contrary the record outlined above clearly shows that the improvements made by the Seminoles from the time of their location on these Creek lands (1866) to 1871, would far exceed

the $1.00 per acre paid by the United States for these Creek lands. Therefore, no element of gratuity is present, but that the United States merely made reparation for its own error in locating the Seminoles on wrong land. In other words, the Government took the easiest and least expensive way to rectify its error, for it would have cost the United States more to pay the Seminoles for their improvements and move them on their own lands, than to purchase the lands for the Seminoles, as was done.

We submit that respondent is not entitled to a gratuity offset for the amount of $165,847.17, or any other amount, under the circumstances outlined above.

Findings 11-18 (R. 17-20)

The contention of the petitioner under this phase of the case is that defendant has the burden of proving affirmatively that amounts claimed as gratuity offsets under the act of August 12, 1935, c. 508, 49 Stat. 571, 596, were disbursed by the United States *gratuitously* and for the *benefit* of the Seminole Nation, before the United States is entitled to such offsets.

Said Act of August 12, 1935 provides in part as follows:

> "Sec. 2. In all suits now pending in the Court of Claims by an Indian Tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; * * * Provided, That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; * * * Provided further, That funds appropriated and expended from tribal funds shall not be construed as gratuities; * * *"

This act requires the respondent to show affirmatively that the amounts claimed were expended "*gratuitously*" for the "*benefit of the said tribe or band*", before the Court

is authorized to offiset *gratuities* against the *legal and equitable claims* of petitioner. As offset claims are affirmative claims, the burden of proof is upon the party asserting them.

In the lower Court the respondent relied solely upon a supplemental report of the General Accounting Office, showing disbursements made under general appropriations for the Five Civilized Tribes, to sustain its claim of gratuity offsets; it merely cited this report, and without further proof or argument claimed many of the disbursements set forth therein as gratuity offsets. There was no affirmative showing that the moneys shown in said report to have been disbursed were actually disbursed *gratuitously* or for the *benefit* of the Seminole Nation. While this report is evidence of the fact that said amounts were disbursed for the items set forth therein, yet this report, standing alone, does not support a claim for gratuity offsets against the Seminole Nation. This report merely sets forth an accurate and unbiased account of moneys disbursed by the United States which might have any connection with the affairs of the Seminole Nation and the other Five Civilized Tribes, upon which the Court may or may not, from the further evidence submitted, determine whether the amount spent by the United States for a particular item of disbursement would be a proper offset against the Seminole Nation.

The lower court allowed the items of offset against petitioner upon mere citation to said supplemental report, without further proof or argument in support of them (R. 17-20). Let us emphasize the fact that this supplemental report[5] is *not of itself conclusive evidence* that a disbursement shown therein would be a gratuity offset. Before such items of disbursement are properly allowable as gratuity offsets, reference would have to be had to the act of Congress making the appropriation, and the purpose for which the dis-

[5] The lower court cites what it calls "Gratuity Report" in support of these allowances. The G. A. O. Supplemental report is not so labeled. The letter of the Acting Comptroller General, transmitting this report, refrains from giving it such a title. (See p. 51 herein)

bursement was made. Although an appropriation *title* might not refer to a particular treaty obligation of the United States, yet the disbursement therefrom may be for a definite treaty purpose, and clearly the mere title of an appropriation would not be controlling. The actual purpose for which the disbursement was made would be controlling, and would have to be considered in order properly to determine whether or not an item of disbursement was a gratuity offset.

In the letter, dated September 4, 1936, from the Acting Comptroller General to the Attorney General, transmitting this report, it is stated as follows (R. 51):

> "In accordance with your request there is transmitted herewith a report, in duplicate, of disbursements made by the United States for the benefit of the plaintiffs under other than treaty appropriations, during the period from July 1, 1857, to June 30, 1934. There is also incorporated in this report detail of disbursements under appropriations made for the administration of the affairs of the Five Civilized Tribes, referred to on pages 233 to 235 of the report of this office on Seminole Petition No. L-51, forwarded to you on September 29, 1933, together with a complete list of appropriations under which the aforesaid disbursements were made."

Thus the Comptroller General points out that there is included in this supplemental report the *detail* of disbursements made under the appropriations for the administration of the affairs of the Five Civilized Tribes, the expense of which under the various agreements with these tribes was to be borne by the United States. (See Statement of Comptroller General, quoted herein on page 72).

In *Fain Grain Co.* v. *United States*, 68 Ct. Cls. 441, 445, the court, in considering the proof adequate to sustain a counterclaim advanced by the Government, said:

> "* * * The remainder of defendant's counterclaim is not proved and in this connection perhaps counsel ought to be reminded that statements of accounts, as shown in the Government's books, records, or files, by

themselves and alone, are inadequate. The Government is not exempt from the rules of evidence that apply to other litigants. * * *"

In *Silberstein & Son* v. *United States*, 69 Ct. Cls. 373, 383, the court said:

"* * * The only proof offered in support of this claim is the statement rendered to the plaintiff May 9, 1925, by the Comptroller General (Finding XIV), in which this item is charged against the plaintiff. This is not sufficient to support the counterclaim. The rendering of this statement is no evidence whatever that the amount demanded was in fact due the defendant. It requires the same measure of proof to establish a counterclaim that is required in other claims. The defendant must prove its case by the introduction of satisfactory proof. This has not been done, and the counterclaim for $125.95 for storage charges must be dismissed."

To the same effect is *Mohawk Condensed Milk Co.* v. *United States*, 70 Ct. Cls. 671.

Thus it is well settled that a mere statement of account from the Comptroller General, by itself without further proof, is insufficient proof of a counterclaim advanced by the Government.

We submit that the failure of the lower court to recognize this principle, and its failure to require of respondent further proof and argument as to whether or not a particular item of disbursement was a gratuity offset has resulted in the allowance as gratuity offsets of moneys disbursed by respondent to carry out its treaty and agreement obligations with petitioner, and in the allowance of gratuity offsets of amounts disbursed for the benefit of the individual instead of for the benefit of the "tribe or band."

The decision of the lower court now before us for consideration recognizes the principle that amounts disbursed by the United States to fulfill its treaty and agreement obligations with the Seminole Nation would not be gratuity offsets under the act of August 12, 1935 (R. 32). See also *Blackfeet*

Indians v. *United States*, 81 Ct. Cls. 101, 139-140; *Klamath Indians* v. *United States*, 85 Ct. Cls. 451, 460-461.

Also the lower court has heretofore recognized the principle that amounts disbursed for individual Indians would not be offsets against the tribe or band. In discussing this point in the *Osage* case, 66 Ct. Cls. 64, 82, the court said:

> "It may, however, be well to state that, as to counterclaims, the special act directed considerations only to counterclaims against the Osage Tribe, and not against individuals of the Tribe."

While recognizing the above principles yet the lower court failed properly to apply them in the case at bar. With the above principles in mind let us analyze for the Court the items of gratuity offset allowed by the lower court, and charged against petitioner.

The findings of the lower court with respect to gratuity offsets may be divided into three separate periods:

1. Period from the fiscal year 1857 to 1866—Findings 11, 14 (R. 17-18).

2. Period from the fiscal years 1867 to 1898—Findings 12, 15, 17 (R. 17-19).

3. Period from the fiscal years 1899 to 1934—Findings 13, 16, 18 (R. 17-20).

Period from 1857 to 1898.

In Findings 11, 12, 14, 15 and 17, covering the period from 1857-1898, the amounts shown to have been disbursed either directly for petitioner or jointly with the other Five Civilized Tribes, were disbursed chiefly for *administrative expenses of the United States incurred in fulfilling its treaty obligations with the petitioner.*

The main purposes for which the amounts were disbursed are expenses incurred in maintaining the United States agency in the Seminole Nation, and these items are listed as

follows: Agency buildings and repairs; Fuel, light and water; Miscellaneous Agency expenses; Pay of Indian Agents; Pay of Interpreters; Transportation, etc. of supplies; Pay of miscellaneous employees; Annuity expenses; General Office expense; Hardware, glass, oil and paints; Pay and expenses of Indian Police; and Pay of skilled employees.

As the lower court pointed out in its decision of January 6, 1941, petitioner, plaintiff below, contended that all of the above expenses were incurred by the United States in fulfilling its treaty obligations with petitioner (R. 34). Let us outline briefly the treaty provisions under which these obligations of the United States arose.

The treaty of August 7, 1790 (7 Stat. 35) with the "Upper, Middle and Lower Creeks and Seminoles composing the Creek nation of Indians" (Art. I), provided in part as follows:

> "Article XII. That the Creek nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the United States will from time to time furnish *gratuitously* the said nation with useful domestic animals and implements of husbandry. And further to assist the said nation in so desirable a pursuit, and at the same time to establish a certain mode of communication, *the United States will send such, and so many persons to reside in said nation as they may judge proper, and not exceeding four in number, who shall qualify themselves to act as interpreters.* These persons shall have lands assigned them by the Creeks for cultivation, for themselves and *their successors in office;* but they shall be precluded exercising any kind of traffic." (Italics ours)

The treaty of September 18, 1823 (7 Stat. 224), with the Seminoles alone, provided in part as follows:

> "Article III. The United States will take the Florida Indians under their care and patronage, and will afford them *protection* against all persons whatsoever; * * *"

"Article VI. *An agent, sub-agent, and interpreter, shall be appointed to reside within the Indian boundary aforesaid, to watch over the interests of said tribes;*" (Italics ours)

The Creek and Seminole treaty of August 7, 1856 (11 Stat. 699), provided in part as follows:

"Article 12. So soon as the Seminoles west shall have been removed to the new country herein provided for them, *the United States will then select a site and erect the necessary buildings for an agency,* including a council-house for the Seminoles."

"Article 15. * * * All persons not being members of either tribe, found within their limits, *shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes,* respectively; (assisted, if necessary, by the military;) with the following exceptions, viz: such individuals with their families as may be in the employment of the Government of the United States; all persons peaceably travelling or temporarily sojourning in the country, or trading therein under license *from the proper authority of the United States;* and such persons as may be permitted by the Creeks or Seminoles, with *the assent of the proper authorities of the United States,* to reside within their respective limits without becoming members of either of said tribes." (Italics ours)

"Article 17. All persons licensed by the United States to trade with the Creeks or Seminoles shall be required to pay to the tribe within whose country they trade, a moderate annual compensation for the land and timber used by them, the amount of such compensation, in each case, to be assessed by the proper authorities of said tribe, subject to the approval of the *United States agent therefor.*

"Article 18. The United States shall *protect* the Creeks and Seminoles from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws:

"Article 19. The United States shall have the right to establish and maintain such military posts, military and postroads and *Indian agencies* as may be deemed necessary within the Creek and Seminole country. * * * Such persons only as are or may be in the employment of the United States, in any capacity, civil or military, or subject to the jurisdiction and laws of the Creeks and Seminoles, shall be permitted to farm or raise stock within the limits of any of said military posts or *Indian agencies.* * * *"

In addition to the above obligations of the United States under said Treaty of 1856, the United States agreed to pay the Seminoles west certain sums; to pay interest on funds established therein to be distributed per capita annually by the United States (Article 8); to remove the Seminoles in Florida to the west and provide them with rations and subsistence during their removal and for 12 months thereafter, and to distribute among them clothing, etc. (Art. 9); to pay delegations of Seminoles to Florida to induce those east to remove west (Art. 10); and to survey the boundaries of the reservation (Art. 21).

Other like obligations were assumed by the United States under the Treaty of March 21, 1866, 14 Stat. 755. In Article 1 the "United States guaranteed to the Seminoles quiet possession of their country"; Article 3 provided that the United States purchase and distribute certain goods to the Seminoles; and thereunder the United States also was required to pay interest at 5 per cent per annum on a seventy thousand dollar fund, said interest to be applied annually to the support of schools and to the Seminole government; to expend $43,362 for subsisting said Indians; to distribute $50,000 in awards to the Seminoles; to erect a mill; to provide for the payment of claims of Loyal Seminoles and to appoint commissioners to investigate said claims and pay their expenses (Art. 4); to erect agency buildings (Art. 6); and to provide for a general council of tribes within the Indian Territory, and to pay the expenses of same (Art. 7).

Thus, from the above-quoted treaty provisions, running as far back as 1790, it was not only the custom but a treaty

requirement that respondent furnish an agent, sub-agent and interpreter for the petitioner. It is evident also that it would have been impossible for the United States to fulfill its treaty obligations with the petitioner unless these disbursements were made. This service was promised the Seminoles for a given consideration on their part, and the Government was required to disburse this money to fulfill these treaty duties. Therefore, the amounts disbursed by respondent for maintaining its agency within the Seminole Nation clearly would not be gratuity offsets, but would be disbursements of the United States made incidental to the carrying out of its treaty obligations with petitioner.

Let us comment more particularly upon one of the above treaty obligations owing to petitioner. Article 15 of the Treaty of August 7, 1856, 11 Stat. 699, provided in part as follows:

> "* * * all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz: such individuals with their families as may be in the employment of the Government of the United States;" etc.

Article 1 of the Treaty of March 21, 1866, 14 Stat. 755, provides:

> "* * * In return for these pledges of peace and friendship, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes; * * * Therefore the Seminoles agree to a military occupation of their country at the option and expense of the United States."

Thus, in one treaty, the United States assumed an obligation that *its agent* would remove all intruders within the limits of the Seminole country, and in the other treaty the United States guaranteed to the Seminoles quiet possession of their country.

There was ample reason for these provisions. The Five Civilized Tribes had been driven from their homes east of the Mississippi by the inroads of the whites. The United States had removed them to lands west of the Mississippi and had agreed to isolate them from the white man. However, with the development of our country westward the white men settled the surrounding states and territories, and soon began again to intrude upon their western domains.

Soon after the Treaty of Mar. 21, 1866 was executed, in 1869, the United States Agent for the Seminoles reported to the Commissioner of Indian Affairs (1869 Rept. Comr. Ind. Aff., p. 418), as follows:

> "Already the attention of the people of Kansas on the north, of Missouri on the east, and of Arkansas and Texas on the south and west, is turned to the broad prairies, the fertile valleys, and wooded hills of the Indian Territory. Their longing eyes are bent on the possession of the last fairest portion of the uninhabited region of the United States. While civilization is crowding on its borders, its rich agricultural, splendid climate, and inexhaustible coal and mineral resources are awaiting the development of a higher civilization. What shall be done with the Indian? The recent success of settlers upon Indian lands has emboldened the the squatter, and he sees that he has only to go on these lands, make a claim, and plenty of demagogues are found to raise the cry of lands for the landless, and homes for the homeless; and the rights of the settlers find willing advocates on the floor of Congress, in the press, and on the stump * * *"

In 1876 the United States Indian Agent wrote the Commissioner of Indian Affairs as follows (1876 Rept. Comr. Ind. Aff., p. 63):

> "Another great source of continued disturbance is the large number of unauthorized and irresponsible white intruders in the Territory. Vigorous measures ought at once to be adopted to carry into effect *those treaty stipulations* which guarantee to keep these na-

tions free from persons not duly authorized by law to reside therein. Their number is constantly on the increase; in one county alone in the Chickasaw Nation it is estimated that there are three thousand." (Italics ours)

The duties of the United States Indian Agent for the Five Civilized Tribes agency, were outlined in his report to the Commissioner of Indian Affairs (1877 Rept. Comr. Ind. Aff., p. 107), as follows:

"My work has not been to protect these tribes from cold and hunger by furnishing them with clothing and food—these are not supplied by the United States Government—as much as it has been *to protect them in their* treaty rights against the impositions and craftiness of dishonest white men. I would not intimate by this remark that there are no real good and honest white men among these tribes. There are very many, but those who are unscrupulous, selfish, unprincipled and indolent far outnumber them. And while the good and honest white people living here are slow to speak and act against the sins of the country, the latter are bold and reckless in their deeds of corruption; in fact, they control, to a large extent, the political and financial interests of the tribes; and the crimes charged upon the Indians in too many cases may be traced either directly to the influence or acts of corrupt, designing white men * * *" (Italics ours).

The intruders continued to pour into the Indian Territory, and in commenting upon organized efforts of settlers to invade the lands of the Five Civilized Tribes; United States Agent Tufts, in 1881, states as follows (1881 Rept. Comr. Ind. Aff., p. 104):

"* * * The prompt arrest and conviction of 'Captain' Payne by the United States authority, have convinced these people, more than anything that has been done for years, *that the United States intends to protect their rights and to carry out in good faith the provisions of the treaty.*" (Italics ours)

In endeavoring to carry out this treaty obligation—to remove intruders—an Indian Police force was organized, and used for this purpose (1883 Rept. Comr. Ind. Aff., p. 88). The United States Agent reported (1889 Rept. Comr. Ind. Aff., p. 210):

> "Since I have been in charge of the agency the police have served effectively in removing intruders, suppressing crime, preserving peace, arresting criminals, guarding Government funds, and in many ways performing arduous and oftimes dangerous duties * * *."

In 1885, United States Agent, Robert L. Owen (who later became U. S. Senator), reported (1885 Rept. Comr. Ind. Aff., p. 107):

> "The United States agent is kept busy trying to determine who are intruders, of the great number reported to the agency as such; then putting them out the limits of the agency; and, lastly, keeping them out with a United States Indian police force * * *. The United States is available for this purpose, but it is like using a sledge-hammer to fan away the flies with—strong enough to crush the fly, but not nicely adjusted to the business."

Thus we have outlined the duties of the United States Agent and it is evident that his efforts were chiefly confined to directing the work protecting these tribes from white intruders, and attempting to remove them in fulfillment of the Government's treaty obligations with these tribes.

In denying the petitioner's contention—that these disbursements were treaty disbursements of the United States, and not gratuity offsets—the lower Court stated (R. 34):

> "However persuasive this argument may once have been, this question has heretofore been decided adversely to the plaintiff by the cases of Blackfeet, et al, Tribes v. United States, 81 Ct. Cls. 101, 137, and Shoshone Tribe v. United States, 82 Ct. Cls. 23, 93. We hold accordingly that the defendant is entitled to these offsets."

An examination of these cases shows that they have no application to the question now before us. These cases involved what is known as the "Wild Tribes", the treaties with which are separate and distinct from those of the Five Civilized Tribes. The question before the court in these cases was whether the administrative expenses were beneficial to the Indians, not whether these disbursements were incurred in the performance of the treaty obligations of the United States owing to the tribe. In the *Blackfeet* case, 81 Ct. Cls. 101, 137, the court said:

> "It is contended by plaintiffs that these disbursements were made for the general administrative expenses of the Indian Service of the United States, and that the record does not show that the plaintiffs, as tribes, received any benefit from such expenditures, or, even if it be assumed that they did, to what extent. *They were expenditures which the United States was under no legal obligation to make for, or in behalf of, the plaintiffs.* They were unqualified gratuities, and, as such, under the plain provisions of the jurisdictional act, are properly chargeable against the plaintiffs as set-offs against the amounts they are entitled to recover." (Italics ours.)

The court in the *Shoshone* case, 82 Ct. Cls. 23, 93, merely quoted with approval the above language in the Blackfeet case.

In the case at bar the question now under discussion is not one of *benefit;* but the question is whether the United States was *required* to maintain said agency in order that the duties and obligations assumed by it under the Treaties of 1856 and 1866 could be fulfilled. Clearly said administrative expenses as to the Seminole Nation were incurred by the United States in fulfilling these treaty obligations, and would not be gratuity offsets against petitioner. Nevertheless the lower court charged said expenses to the petitioner.

We submit that the lower court erred in this holding, and we request this court to correct the error.

"General Office Expense"

Disbursements for the item of "General Office Expense" were made from the appropriation "Commission, Five Civilized Tribes" (R. 71), and were for the expenses of the Dawes Commission. This commission was created by Section 16 of the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, to negotiate with the Five Civilized Tribes for the extinguishment of their tribal governments and the allotment of their lands in severalty "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.

Under the then existing treaties these tribes had been guaranteed the right of self-government and complete isolation from the whites, and the United States further agreed that before a State or territory could properly be created out of their national domains, the consent of these tribes must be obtained (Creek and Seminole treaty of August 7, 1856, Arts. 4; 15; 11 Stat. 699). As we have seen, the United States utterly failed to fulfill its obligations to remove white intruders, and to carry out its policy of isolating these tribes.

As is stated by the Dawes Commission in its report of November 20, 1894 (Repts. Comm. F. C. T., H. Ex. Doc. No. 1, Pt. 5, 53rd Cong. 3rd Sess., p. LXVII, Cong. Ser. 3305):

> "The barrier opposed at all times by those in authority in the tribes, and assuming to speak for them as to any change in existing conditions, is what they claim to be 'the treaty situation.' They mean by this term that the United States is under treaty obligations not to interfere in their internal policy, but has guaranteed to them self-government and absolute exclusion of white citizens from any abode among them; that the United States is bound to isolate them absolutely. It can not be doubted that this was substantially the original governing idea in establishing the Five Tribes in the Indian Territory, more or less clearly expressed in the treaties, which are the basis of whatever title and authority they at present have in the possession of that Territory, over which they now claim this exclusive jurisdiction. To

that end the United States, in different treaties and patents executed in pursuance of such treaties, conveyed to the several tribes the country originally known as the 'Indian Territory,' of which their present possessions are a part only, and agreed to the establishment of them therein of governments of their own. The United States also agreed to exclude all white persons from their borders.

* * * * * * * *

"For quite a number of years after the institution of this project it seemed successful, and the Indians under it made favorable advance toward its realization. But within the last few years all the conditions under which it was inaugurated have undergone so complete a change that it has become no longer possible. It is hardly necessary to call attention to the contrast between the present conditions surrounding this Territory and those under which it was set apart. Large and populous States of the Union are now on all sides of it, and one-half of it has been constituted a Territory of the United States. These States and this Territory are teeming with population and increasing in numbers at a marvelous rate. The resources of the Territory itself have been developed to such a degree and are of such immense and tempting value that they are attracting to it an irresistible pressure from enterprising citizens. The executory conditions contained in the treaties have become impossible of execution. It is no longer possible for the United States to keep its citizens out of the Territory. * * *"

With the Indian country overrun with white intruders, the United States abandoned its policy of isolating these Five Civilized Tribes, and created the Dawes Commission to negotiate with them to free the United States from the requirements of its treaties with these tribes, which it had failed to perform; and to secure agreements with the tribes authorizing a transformation from the tribal estate, held in common, to individual estates, with title in the individual Indians, with the ultimate end in view of incorporating this Territory into a new State of the Union—a purpose clearly beneficial to the United States, and in furthering its change of policy with respect to these tribes.

These negotiations were carried on by the Dawes Commission over a period of years during which time the Five Civilized Tribes refused to consider the proposed change. The item "General Office Expense" covers the expense of the Dawes Commission during the period of these negotiations. Clearly this expense is not chargeable to the Five Civilized Tribes, who vigorously opposed this change, and only after the coercive provisions of the Curtis Act were they subdued and forced to accept the Government's proposals.

Therefore, this item of expense was incurred by the United States in securing the release from its former treaty obligations with these tribes, and in furthering *its change of policy toward them.* We submit that the lower court erred in charging any part of this item as a gratuity offset against petitioner.

Period from 1899 to 1934 (R. 17-20)

The lower court erred in charging the Seminole Nation as gratuity offsets with amounts disbursed by the United States in fulfilling its obligations under the Seminole agreements, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, and by Act of June 2, 1900, c. 610, 31 Stat. 250.

We will endeavor to show the court that very little, if any, of the disbursements set forth in Findings 13 and 18 (R. 17-20) are gratuities chargeable to plaintiff, or the Five Civilized Tribes generally, under said Act of August 12, 1935.

The agreements executed by the Dawes Commission with the Five Civilized Tribes provided generally for the extinguishment of the tribal title to their lands and the transformation of them into *individual estates,* the sale of the unallotted lands and townsites, the per capita payment of the proceeds of said sales and of the other tribal funds, or the equalization of allotments, and for the protection of the individual allottees in the possession of their individual allotments. The United States realized that it must protect the individual allottees from the great number of "grafters"

within their territory, and these agreements, provided restrictions upon the alienation of allotments for a number of years, and the leasing of their lands, etc., under the supervision and with the approval of the Secretary of the Interior.

To understand properly the ultimate terms of the Seminole Agreement, let us review briefly its background. When the Dawes Commission first began its negotiations with the Five Civilized Tribes, it made certain proposals to the Seminoles to be used as a basis for the proposed agreement. These proposals are listed in the Dawes Commission's Report of November 20, 1894 (Repts. Comm. to F. C. T., H. Ex. Doc. No. 1, Pt. 5, 53rd Cong. 3rd Sess., p. LXIV-LXV, Cong. Ser. 3305) as follows:

"Propositions to the Seminoles.

"The Commission to the Five Civilized Tribes, appointed by the President under Section 16 of an act of Congress, approved March 3, 1893, propose to treat with the Seminole Nation on the general lines indicated below, to be modified as may be deemed wise by both parties after discussion and conference.

"First. To divide all lands now owned by the Seminole Nation, not including townsites, among all citizens according to the treaties now in force, reserving town sites, coal and minerals, for sale under special agreement. Sufficient land for a good home for each citizen to be inalienable for twenty-five years, or such longer period as may be agreed upon.

"Second. *The United States to agree* to put each allottee in possession of the lands allotted to him *without expense to the allottee*—that is; to remove from the allottee's land all persons who have no written authority to be on the same, executed by the allottee after the date of the evidence of title.

"Third. Town sites, and coal and mineral discovered before allotment,—to be the subjects of special agreements between the parties—such as will secure to the nation and to those who have invested in them a just

protection and adjustment of the respective rights and interests therein.

"Fourth. A final settlement of all claims against the United States.

"Fifth. All invested funds, not devoted to school purposes, and all moneys derived from the sale of townsites, coal and minerals, as well as all moneys found due from the United States, to be divided per capita among the citizens according to their respective rights under the treaties and agreements.

"Sixth. All moneys due the citizens of said nation, except that devoted to school purposes, to be paid per capita to the citizens entitled thereto by an officer of the United States, to be appointed by the President.

"Seventh. If an agreement shall be reached with the Seminole Nation a Territorial government may be formed by Congress and established over the territory of the Seminole Nation and such other of the Five Civilized Tribes as may have at the time agreed to allotment of lands and change of government.

"Eighth. Such agreements when made shall be submitted for ratification to the Seminole government, and, if ratified by it, shall then be submitted to Congress for approval.

"Ninth. The present tribal government to continue in existence until after the lands are allotted and the allottee put in possession, each of his own land, after which a territorial government may be established by Congress."

The Original Seminole Agreement as finally executed provided generally that the United States appraise and classify the Seminole lands, and divide and allot them equally among the members of the tribe, under direction and supervision of the Dawes Commission; that leases of mineral lands be approved by the Secretary of the Interior; that the United States take over and administer the Seminole school fund; that the homesteads of allottees be inalienable in perpetuity; that all Seminole moneys, after equalizing allotments, except the school fund, shall be paid per capita

by an officer of the United States appointed by the Secretary of the Interior.

The Supplemental Seminole Agreement, approved by Act of June 2, 1900, c. 610, 31 Stat. 250, provided for the making of rolls upon which the distribution of Seminole property should be made; and provided for the manner in which the lands and funds belonging to allottees should descend to heirs upon the death of the allottees.

Thus in consideration of the Seminoles' agreeing to give up their former mode of life and to give up their tribal holdings and to adopt the ways of the white man; the United States agreed to divide their tribal estate among the members of the tribe, and to perform the other obligations outlined in these Agreements.

Let us point out to the Court that one of the general inducements held out by the Dawes Commission to secure the agreements with the Five Civilized Tribes was that if these tribes would agree to individualize their tribal holdings and accept the Government's new policy with respect to them, the United States would pay the expense of the administration. Section 34 of the Original Creek Agreement, approved by Act of March 1, 1901, c. 676, 31 Stat. 861, 871, provided in part as follows:

> "The United States shall pay all expenses incident to the survey, platting, and disposition of town lots, and of allotments of lands made under the provisions of this agreement, * * *"

The agreements with the Choctaws and Chickasaws (Atoka Agreement, approved by Act of June 28, 1898, c. 517, 30 Stat. 495, 505, 509) and Cherokees (Cherokee Agreement, Sec. 50, approved by Act of July 1, 1902, c. 1375, 32 Stat. 716, 724) also contained similar provisions.

The lower court, in holding that the petitioner was chargeable with the expenses incurred by the United States in carrying out its agreement obligations with petitioner, stated (R. 36):

> "There was no express provision in the Seminole agreement that the United States should bear the expense of the allotment of the Seminole lands, and the majority of the Court is of the opinion that an obligation to do so cannot be implied. Choctaw Nation v. United States, 91 Ct. Cls. 320."

Although no such express provision is contained in the Seminole Agreement requiring the United States to bear the expense of the distribution of the Seminole tribal estate, yet a reference to the above mentioned "Proposals to the Seminoles" made by the Dawes Commission to induce them to execute the agreement shows what obligations the United States would assume should said agreement be made. In consideration of the Seminoles' agreeing to give up their tribal holdings in lands, money, etc., the United States agreed to divide this tribal estate among the members of the tribe in accordance with the terms of said agreement, etc.

We submit that the lower court should have applied the well settled rule set forth in 6 Ruling Case Law, p. 856, as follows:

> "One who undertakes to accomplish a certain result agrees by implication to supply all the means necessary thereto. He is bound by implication to do everything necessary to enable him to perform his contract. If the giving of notice is requisite to the proper execution of a contract, a promise to give such notice will be inferred. In fact, it may be said that contracts impose on parties, not merely obligations expressed in them, but everything which, by law, equity, and custom, is considered incidental to the particular contract, or necessary to carry it into effect. * * * "

See also Vol. 3, Williston on Contracts, Sec. 1293; *Hall* v. *Luckman*, 107 N. W. 932, 933; *John O'Brien Lumber Co.* v. *Wilkinson*, 94 N. W. 337, 338. The above principle is applied in disputes between parties of equal standing, and it should have been applied by the lower court with even greater particularity in this case, especially in view of the rule laid down by this Court in numerous cases that Indian treaties

and agreements are to be construed liberally in favor of our dependent Indian wards. (*Choate* v. *Trapp*, 224 U. S. 665, 675; *Jones* v. *Meehan*, 176 U. S. 1, 11).

In the American Law Institute Restatement of the Law on Contracts, Sec. 230, p. 310, it is stated:

> "The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

Under the circumstances surrounding the execution of these agreements with the Five Civilized Tribes, and in view of the propositions made to them by the Dawes Commission as to the obligations that the United States would assume under them, would it not be unreasonable to say that the United States would be excused from allotting the lands and dividing these estates because of the failure of these tribes to bear this expense? Would it be reasonable to assume that these tribes would have executed these agreements if they had understood that they would be required to pay the expense of carrying out the Government's new policy which had been forced upon them?

We believe that Hon. W. W. Hastings—a Cherokee himself, tribal attorney for that tribe, and for years a member of Congress—fairly sums up this whole situation, as follows (Hearings, H. Comm. Ind. Aff., 66th Cong., 1st Sess., on Sept. 26, 1919, pp. 249-252):

> "Mr. Hastings. Let me inject a word. In the early part of 1830 and between 1830 and 1840 the Five Civilized Tribes were practically coerced into making treaties with the Government by which they were removed from comfortable homes and civilized surroundings in the eastern States to what was afterwards known as the Indian Territory. The Government, by various treaties

with these tribes, agreed to protect them and promised in those treaties that they should hold those lands forever in their tribal capacity. Subsequent treaties were made confirming these prior treaties.

"By the act of March 3, 1893, 26 years ago, the Government after finding that the Indian Territory was surrounded, railroads run through the country, cities and towns had grown up, thousands and thousands of white men had gone in there, some in towns and some as tenants, sent what is known as the Dawes Commission down to negotiate with the Five Civilized Tribes to induce them, if possible, to give up their tribal government and become citizens of the United States and to become ultimately a State of the Union. The Dawes Commission had very great difficulty in negotiating these agreements. I hesitate to put it into the record, but it is the truth that they, in a measure, coerced them into making those agreements. The Cherokees never made one. They did make one in 1899. They ratified it; the Government here did not. But by means of certain coercive legislation on behalf of Congress, they were compelled to accept an act of Congress approved July 1, 1902, because it was an alternative either to accept that legislation or to go under other legislation that had been enacted by the Congress that was exceptionally objectionable to the tribe.

"Under those circumstances, either agreements negotiated with the tribes, or acts of Congress enacted, and submitted to the tribes, which they accepted, and it amounted legally to the same thing this legislation provided for making rolls on behalf of the Government, survey of lands and individualization of lands, and winding up of their estate; in other words, giving to each member of the tribe the portion that was due him.

"Since these agreements were negotiated with the representatives of the Government, first, the Dawes Commission, and later others have been doing this work under those various agreements. * * * Of course, the Government of the United States had to put some terms there favorable to the Indians to get them to accept them, and among others, they agreed to bear this expense and are bearing the expense of administration in this work.

"Mr. Elston. Is that by implication or agreement?

"Mr. Hastings. It is by agreement with these tribes that they shall do these things. Let me proceed and let Mr. Meritt correct me if I am in error. This has been my life work. Every one of these agreements contains an exemption from taxation to a certain extent. I am not so familiar with all the tribes; generally speaking, restricted land is exempt from taxation, and in addition to that, the homestead of a Cherokee Indian is exempted as long as he holds it. The homestead of the Seminole is exempted in perpetuity. The homestead of the Creek is exempted for 21 years, as I recall.

"There have been many court decisions. These exemptions have led to litigation and to interpretations placed upon these provisions. Congress in 1908 tried to tax all these lands. The Indians resisted it under those agreements. It was brought to the Supreme Court of the United States and the Supreme Court declared that act unconstitutional. So the counties can not levy taxes. Our State can not, if it wants to. Why? Your Federal Government made it impossible, and therefore in some of those communities great areas of lands are not taxable, and neither township, county, or State can collect a cent of taxes.

* * * * * * * *

"* * * All this legislation put together shows the way this Government is under obligation to spend the money. It is a large sum of money.

* * * * * * * *

"The affairs of the Seminoles are about wound up. They have two boarding schools. One of them is in litigation; a white man bought part of the land, and it has been in litigation. The affairs of the Seminoles ought to be wound up in the next two years, except in none of these three tribes will the restricted Indian be turned loose from the supervision of the Government until 1931, the time determined by Congress."

It has been the understanding of all branches of the Government that, under these agreements with the Five Civilized Tribes, the United States was to bear the expense of the administration of these estates and the division of them into individual holdings; and that as long as the individual In-

dians were restricted these agreements require the United States to protect them in their individual holdings. In harmony with this universal understanding is the statement contained in the General Accounting Office Report, which is as follows (R. 70):

> "Pursuant to the aforesaid act (March 3, 1893), commissioners were appointed, who entered into separate agreements with the aforesaid nations of Indians, including the Seminole Nation. Said agreements provided generally that the United States should bear the expense of the administration or division of the tribal estates, which involved the allotment of lands in severalty; the survey, appraisement, and sale of certain lands; the survey and sale of town sites; and the leasing of certain mineral and oil lands. In carrying out said projects, there were also considerable expenses incurred by the United States in the removal of objectionable persons from allotments; the removal of restrictions upon the alienation of lands of certain allottees; the investigation of leases fraudulently obtained; and other expenses, including the pay of commissioners, superintendents, inspectors, attorneys, and miscellaneous employees."

With this background before us let us now direct the Court's attention to the findings of the lower court with respect to gratuity offsets. In examining the items of disbursement let us keep in mind that under the agreements with the Five Civilized Tribes the general duties of the United States were two fold: that of dividing the tribal estate among the members of the respective tribes—individualizing them; and that of protecting the individual Indian in his individual estate during the period of restrictions.

Finding 13

In Finding 13 of the lower court are set forth all the items of disbursement made directly for the Seminole Nation. However, it is obvious that the following items of disbursement were made directly for, and necessarily incidental to, the carrying out of the obligations of the United States with

the Seminole Nation and therefore would not be gratuity offsets:

Appraising, Enrolling, General Office Expenses, Miscellaneous agency expenses, Pay miscellaneous employees, Pay capita payment expenses, Preservation of records, Probate expenses, Protecting property interests, Sale of townsites, Surveying, Surveying and alloting, Traveling expenses.

As to the other items included in this finding there was no affirmative showing that they were proper charges against the Seminole Nation. These items are listed as follows: Clothing, Expenses of delegates, Livestock, Medical attention, Provisions and other rations. These disbursements were made after the tribal lands were allotted, and when practically all the other tribal property was individualized. Most of the restrictions had been removed, and the remaining obligations of the United States were owing to a small class of individual Indians, known as restricted Indians. Therefore, unless they are shown definitely to have been disbursed for the Seminole Nation generally, they would not be proper offsets against the tribe, but would be chargeable to the individual estates of restricted Indians.

The amount of $20,377.89 disbursed for the item of "Education" was disallowed by the lower court as not a proper charge against the petitioner, after we had pointed out that such disbursements were not made for the benefit of the Seminole Nation, but were made for the benefit of whites and negroes (R. 18, 37, 41-42). Thus no question arises as to this item. However, it clearly demonstrates the real nature of the claim of respondent for gratuity offsets.

Finding 18

This finding of the lower court sets up as gratuity offsets all amounts disbursed by the United States from 1899 to 1934, in fulfilling its obligations under agreements with *all* of the Five Civilized Tribes, and a percentage was charged against the Seminole Nation without proof or argument in support of such charge. Let us keep in mind also that the

appropriations from which these disbursements were obtained were culled for amounts directly chargeable to the Seminole Nation which were set up separately in finding 13, heretofore discussed, and that the amounts set up in finding 18 are balances disbursed from said appropriations which respondent could not prove were disbursed for the Seminole Nation.

Although the Seminole Nation had its own domain, separate and distinct from the other Five Civilized Tribes, and was the smallest tribe, and the administration and distribution of its tribal estate was free from complications, yet the lower court charged it with a percentage of all moneys spent in administering and distributing the vast estates of the other Five Civilized Tribes; this, in the face of the statement in finding 19 that "what portion of the expenditures set out in findings 17 and 18 were spent for the benefit of the Seminole Nation does not appear by the proof." (R. 20.)

Certainly any charge made against the Seminole Nation on this basis would be most unfair to petitioner, for no proof was adduced to support such a charge. Nevertheless the lower court arbitrarily charged petitioner with 3.72 per cent of this total.

We have heretofore reviewed generally the obligations of the United States under the agreements with the Five Civilized Tribes, and have shown the Court that as an inducement to these tribes to agree to divide their tribal estates and individualize their holdings, the United States agreed to pay the expense of administration. Also we have shown that under these agreements the general duties of the United States were two-fold: first, the duty of administering the estates and individualizing them without charge to the tribes or the individual allottees; and second, the duty of protecting the individual allottees in the possession of their individual estates for the period of restrictions, and supervising the leasing of their lands for various purposes. Practically all of the items of disbursements set forth in finding 18 were for the purpose of carrying out

these agreement obligations of the United States with these tribes, and therefore would not be gratuity offsets.

The following items were either directly or incidentally disbursed under these agreements:

Allotting; appraising; appraising and selling lands; appraisal and sale of restricted lands; automobiles and repairs; copying allotment records; equalization of allotments expenses; examining records in disputed citizenship cases; feed and care of the horses; fuel, light and water; general office expenses; household equipment; incidental expenses; investigating leases; leasing of mineral and other lands; miscellaneous agency expenses, oil and gas expense, oil and gas mining supervision; allotted lands; pay and expenses of Indian police; pay of Indian agents; pay of clerks; pay of Indian inspectors; pay of interpreters; pay of miscellaneous employees; pay of superintendents; per capita payment expenses; preservation of records; protecting property interest of restricted members; provisions and other rations; purchase of horses; removal of alienation restrictions; sale of allotted lands; sale of restricted lands; sale of townlots; sale of townsites; sale of unallotted lands; surveying; surveying and allotting; surveying segregated coal and asphalt lands; surveying, sale, etc., of lands; timber estimating; transportation, etc., of supplies; and traveling expenses.

Many of the items set forth in finding 18, and allowed by the lower court as gratuity offsets, could not possibly be charges against the Seminole Nation, unless the United States can show affirmatively that they were a *gratuity* and further that they were *beneficial to said tribe.* For instance, the Seminole Nation had just one townsite which was disposed of under the terms of the Seminole Agreement by the tribal officials, at no expense to the United States (*Seminole Nation* v. *United States,* 92 Ct. Cls. 210). Yet the Seminole Nation is charged with "Sale of townlots" and "Sale of town sites", and other incidental expenses connected therewith, such as General Office Ex-

penses, Pay of Miscellaneous Employees, etc., incurred in disposing of the townsites of the other Five Civilized Tribes (R. 20). Although within the Seminole Nation there was no coal or asphalt, yet it is charged with a part of "Surveying segregated coal and asphalt lands", etc., and other expenses properly chargeable solely to the Choctaw and Chickasaw Nations (R. 20). See Atoka Agreement of the Choctaw and Chickasaw Nations, approved by Act of June 28, 1898, c. 517, 30 Stat. 495, 505, 510; also the Supplemental Agreement, approved by Act of July 1, 1902, c. 1362, 32 Stat. 641, 653-655 (Secs. 56-63).

"Education"

Although the amount of $1,693,525.90 of the item of "Education" was disbursed for the maintenance of the Cherokee Orphans Training School, at Tahlaquah, Cherokee Nation (R. 52-60), located miles away from the Seminole Nation, yet the Seminole Nation is charged 3.72 per cent of said amount, or $62,999.16, notwithstanding the fact that the attendance records show that not a Seminole Indian was in attendance at this school (R. 72), and that the Seminole Nation maintained with tribal funds its own school for the education of its orphan children (R. 72).

Furthermore, the record shows that $95,758.84 of the total item of "Education" was disbursed in "Aid of common schools" in the State of Oklahoma, (R. 71), yet the Seminole Nation is charged with a part of this money. The appropriations made in aid of the common schools of Oklahoma were begun in the Act of August 24, 1912, c. 388, 37 Stat. 518, 533.

Under the agreements with the United States, certain lands of the Five Civilized Tribes were made non-taxable, and this right was upheld by this Court in *Choate* v. *Trapp*, 224 U. S. 665. As these lands could not be taxed by the State of Oklahoma, Congress felt obliged to aid the State in providing a public school system. Beginning with said Act of August 24, 1912, Congress appropriated annually

amounts for this purpose, and paid it directly to the school districts of said State. What the United States gave directly to the State of Oklahoma to aid it in establishing adequate public school facilities certainly would not be a gratuity offset against petitioner.

Other Miscellaneous Items

Several other items of disbursements need further explanation and are listed as follows:

Agricultural Aid, Construction and Maintenance of Claremore Hospital, Livestock, Medical Attention, Pay and Expenses of Farmers, Pay and Expenses of Field Matrons, and Probate Expenses.

These items were allowed as gratuity offsets against the claims of petitioner without proof or argument that any part of them were disbursed for the Seminole Nation. Whether or not these items are gratuity offsets would depend largely upon the date of the disbursement. If the disbursements were made before allotment and not in pursuance of a treaty obligation, they would be gratuities, provided it was shown by proof that such disbursements were made for the Seminole Nation. If these disbursements were made after allotment, they would be disbursements for the benefit of individuals, and would not be directly chargeable to the Seminole Nation as a tribe. (*Osage Case, supra*, p. 53.)

As we have seen, the whole object of the agreements made with the Five Civilized Tribes was to extinguish the tribal estates, and wholly to emancipate the Indians. After allotments were made, and the individual Indians received their deeds, relinquishing the interest of the Seminole Nation and of the United States in said lands, the individualization was accomplished insofar as the lands were concerned.

Most of the above expense was incurred over a period from 1911 to 1934. At this time all Seminole lands had been allotted. In its report for the year 1902, p. 43, the Commission to the Five Civilized Tribes reported that:

"The Seminole Allotment work is completed. The last 281 allotments made, however, are yet to be recorded, checked, and certificates of allotment written for same."

In his report for the year 1914, pp. 49-50, the Commissioner of Indian Affairs stated:

"In the Seminole Nation there remain about $1,800,000 of tribal moneys to be individualized before the tribal affairs can be entirely finished.

* * * * *

"From the foregoing it will be seen that while the work of the Indian Department among the Five Civilized Tribes is approaching completion in tribal matters there necessarily remains a great work to be done among the individual Indians."

In the Hearings before the House Committee on Indian Affairs, 66th Congress, 1st Sess., pp. 254, 259, referred to above, Assistant Commissioner of Indian Affairs Meritt submitted a statement of the status of the affairs of the Five Civilized Tribes, and on page 258 it is stated that:

"The tribal affairs of the Cherokee Nation are practically closed and those of the Seminole and Creek Indian Nations will be disposed of within a short time. The tribal governments of the Cherokee and Seminole Nations have been practically abolished, there being at present no tribal officers.

"Supervision over Restricted Individual Indian Property.

"With the completion of the work relating to the disposal of the tribal property of the Five Civilized Tribes the administration of Indian affairs in eastern Oklahoma is becoming primarily a matter relating to the restricted property and welfare of individual Indians, especially of those classified as restricted Indians."

If subsequent to allotment the United States adopted the policy of furnishing agricultural aid and assistance to some of the individual members of the tribe in developing their

own individual farms, certainly such a policy would not afford respondent the right to claim the amounts thus spent as a gratuity offset against the tribe as a whole. Clearly this money, if disbursed at all for the Seminoles, was a benefit to the individuals who received this aid and was not a benefit to the tribe as a whole.

Even if these disbursements might be considered tribal, the respondent failed to show that any part of these amounts were disbursed for the Seminole Nation, or individual members thereof. As heretofore pointed out, the respondent culled out of the appropriations from which the above items were paid, all amounts disbursed within the Seminole Nation, which amounts have been set up in finding 13 of the lower court. Notwithstanding this fact, in its decision the lower court charged the petitioner with an arbitrary 3.72 per cent of the moneys disbursed for these items within the limits of the Five Civilized Tribes generally, without proof whatsoever that any part of said items were disbursed within the Seminole Nation. As the lower court states in its decision (finding 19) "what portion of the expenditures set out in Findings 17 and 18 were spent for the Seminole Nation does not appear by the proof." Certainly the lower court erred in charging any part of the above expenses to the Seminole Nation, without requiring proof of the respondent that any of these moneys were disbursed for the Seminole Nation.

Probate Expenses

The lower court charged the petitioner with a part of the money shown in finding 18 to have been disbursed for probate expenses of the Five Civilized Tribes. In the division of the tribal estates under the agreements made with the Five Civilized Tribes the minors shared equally with the adult members of these tribes. To prevent their exploitation, the United States had provided restrictions against the alienation of their lands.

By Section 6 of the Act of May 27, 1908, c. 199, 35 Stat, 312, 313-314, Congress conferred upon the County Courts of the State of Oklahoma probate jurisdiction with supervision of the estates of minor allottees. Said Section 6 also provided that the Secretary appoint local representatives to protect said estates (the necessary court fees to be allowed against the estates of said minors), and investigate their management from time to time, and "to counsel and advise all allottees, adult or minor, having restricted lands, of all of their legal rights with reference to their restricted lands, *without charge* * * *." The Commissioner of Indian Affairs in his report for the year 1914, pages 50-52, explains the work of the probate attorneys under said Act of 1908 as follows:

> "The minor children of the Five Civilized Tribes are perhaps the richest average children in the United States, which condition results from the fact that in allotting the Oklahoma Indians the children were given the same number of acres of land as their parents and share equally in tribal funds. Consequently when Congress, in the act of May 27, 1908, conferred upon the county courts probate jurisdiction there was involved a greater amount of probate work than existed anywhere else. This, together with the fact that Oklahoma was admitted into the Union in 1907 and that the county judges then elected did not all possess the highest standards necessarily brought about a demoralized, inefficient, and in some instances corrupt condition.
>
> "It is apparent that many guardians were appointed without regard to their fitness and insolvent bondsmen accepted. It was not uncommon for lands of minor Indian children to be sold on appraisements influenced by prospective purchasers and for inadequate prices. Excessive compensation was many times allowed guardians and unreasonably large fees paid to attorneys. Under these conditions the property of Indian children was frequently so ravished that when final reports were called for they were not forthcoming, and estates were often found to have been dissipated and their bondsmen financially irresponsible. Altogether it developed a condition demanding speedy and radical reforms.
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> * * * * * * *

"To insure the prosecution of the probate work in a systematic and effective manner a force was organized consisting of the best obtainable attorneys, each of whom was chosen on his merits after careful and exhaustive investigation, to assist and cooperate with the county judges. This force was made up in part of attorneys employed at the expense of the several tribes and partly at the expense of the United States under authority of section 18 of the act of Congress of June 30, 1913.

"Widespread and gratifying results have already been accomplished. Wrongdoers have been prosecuted; estates have been recovered; dishonest and incompetent guardians have been removed; worthless bonds have been replaced with responsible bondsmen; and many thousands of dollars have been saved to Indian minors and invested for their benefit. These direct results are also increased to an extent which can only be approximated by the moral influence which has resulted, operating powerfully to prevent a repetition of wrongdoing and to insure better conditions in the future."

Thus we see that, when the United States attempted to transfer the protection of the estates of minor allottees to the local courts of Oklahoma, the above condition arose and widespread robbery and dissipation of these estates followed. To retrieve some of the property of these estates probate attorneys were appointed. As a part of the necessary expense of protecting these restricted allottees in the possession of their property under the terms of the agreements with the Five Civilized Tribes, the defendant was required to pay this expense.

In the *Heckman* case, *supra*, (224 U. S. 413) the duties of the United States were comprehensively considered and passed upon by this Court. In the statement of this case, it is said (224 U. S. 413, 415):

"The government states in its brief that between July 14, 1908, and October 12, 1909, the United States brought 301 bills in equity against some 16,000 defendants to cancel some 30,000 conveyances of allotted lands * * * upon the ground that the conveyances were in violation of existing restrictions upon the power of alienation * * *"

The defendant demurred upon the ground that the bill was insufficient and that the United States was without the capacity to maintain its suits. The trial court sustained the demurrer, and upon appeal the Circuit Court of Appeals reversed the lower court (*United States* v. *Allen*, 179 Fed. 13), and the case was then appealed to this Court. This Court held as follows: "Our conclusion is that the suit was well brought" (*supra*, p. 448).

In the consideration of the case, this Court passed upon the duties and obligations of the United States in protecting the allotted lands of the restricted Indians of the Five Civilized Tribes from the "grafters", and this at its own expense. After setting out the policy of the United States to require the Indians to accept allotments in severalty, and to protect the Indians in their individual ownership of said allotments through suitable restrictions, the Court said (p. 438):

> "As was well said by the court below, 'If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, belligerent people.' The authority to enforce restrictions is the necessary complement of the power to impose them."

And, upon the questions of the performance of these duties and obligations of the United States, this Court said (p. 443):

> "It is urged that this clause [of the act of Congress authorizing the suits] did not confer authority to sue. * * * This seems to us a strained construction, in view of the obvious purpose of the act. And it fails

to give adequate effect to the words 'such suits *to be brought* on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, *the necessary expenses incurred in so doing to be defrayed from money appropriated by this act.*' In addition to the appropriation of moneys for expenditure under the direction of the Secretary of the Interior, that act appropriated the sum of $50,000 'to be immediately available and available until expended as the Attorney General may direct.' "

This decision sets at rest all questions regarding the duties and obligations of the United States to protect the individual restricted Indians in their property holdings during the period of restrictions, and as the expense of this probate work was a necessary and incidental part of the expense of administering these estates, under the terms of the agreements, it is an expense of the United States and would not be a gratuity offset against the petitioner.

Aside from the above argument, we have the further contention that this probate expense is not a tribal expenditure but inured to the benefit of the individual restricted Indians. After the tribal estates had been *individualized* and were in the hands of individual restricted Indians, this expense was incurred by defendant. As Hon. W. W. Hastings stated in the Hearings before the House Committee on Indian Affairs, at pp. 252-254, referred to *supra*, p. 69, as follows:

"After the tribal affairs of these Indians are wound up, you have the individual restricted Indian that the Government has to look after under this new legislation. With reference to these probate attorneys the Congress of the United States inaugurated that policy. It provided for these things. It thought it necessary in view of the fact that Oklahoma was a new State that it had not been organized from a Territory into a State, that many new people had moved in there, and that they ought to be supervised. Congress after investigation and reports had been made made an appropriation providing for probate attorneys.

"I want to say here in the presence of the assistant commissioner that with the number of restricted In-

dians being reduced, my judgment is that appropriation could be reduced, and that a number of probate attorneys could be employed stationed at convenient places to supervise those estates.

"I felt like a succinct statement ought to go in the record here in order that there might not be an erroneous impression.

"Mr. Elston. I think that is very valuable because we are seeking light here, and in asking these questions, being a new Member, I have no object except to get at the facts, and I assume that nothing will be done that will invalidate any treaty or any obligation in any treaty or any Supreme Court decision that has announced that principle. But as the number of restricted Indians is lessened more and more the obligation would be removed, and my idea is to see whether we are gradually decreasing expenses for these Indians in Oklahoma and keeping pace with the lessening scope of our obligation with respect to them. You have just instanced the possibility that the work of the probate attorneys might be decreased, in view of the fact that the restricted Indians are being decreased * * * "

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"The Chairman. I think you ought to go more fully into the question whether or not some arrangement could not be made whereby some part of this $85,000 for probate attorneys could be borne by the people who were given the benefit of the service.

"Mr. Hastings. That is impracticable. It can not be done. It is not a tribal estate; it is individual, and these Indians are citizens of the United States. The Government of the United States feels that it has a duty to perform with reference to supervising those estates of the individual restricted Indians. The individual restricted Indian would not permit any part of his estate to be taken. For instance, in the Cherokee tribe, how are you going to pay probate attorneys in the Cherokee tribe? He would not pay them. He is not asking for supervision. The Government feels it is its duty to see that the estate is protected and it pays the probate attorneys to come there. The Indian did not ask for them and will not pay them.

"The Chairman. Is the statement that Mr. Hastings is now making the understanding of the bureau, and is that the law as to the probate attorneys?

"Mr. Meritt. I think the statement of Mr. Hastings is correct."

The Act of August 12, 1935, under which defendant claims its gratuity offsets, permits as offsets moneys spent for the benefit of the "tribe or band", and would not permit offsets against the tribe of any moneys spent for individual restricted allottees in protecting them in their individual holdings—tribal lands which had been allotted and individualized under the agreements with these tribes.

Percentages Used by the Lower Court

Although the lower court found that from 1908 to 1928 the Seminole Nation composed 3.08 per cent of the total population of the Five Civilized Tribes, yet the lower court charged the Seminole Nation with 3.72 per cent, or a .64 per cent too much of the total shown in said finding 18 (R. 20, 38). The disbursements set forth in said finding 18 covered the period from the fiscal years 1898-1934, inclusive, and as we have heretofore pointed out, were made for the Five Civilized Tribes generally, and no proof was submitted to show that the Seminole Nation received any part of these disbursements. Yet the lower court charged 3.72 per cent of the total amount to the Seminole Nation.

The percentage of 3.08 for the period from 1908-1928 was worked out from the figures shown by the final rolls compiled by the Dawes Commission during the period 1898-1907. These rolls were prepared pursuant to the act of June 10, 1896, c. 398, 29 Stat. 321, 339; the Curtis Act approved June 28, 1898, c. 517, 30 Stat. 495; the Supplemental Seminole Agreement, ratified by act of June 2, 1900, c. 610, 31 Stat. 250; and the act of April 26, 1906, c. 1876, 34 Stat. 137, 138. The allotments provided for in the Original Seminole Agreement, approved by Congress July 1, 1898, c. 542, 30 Stat. 567, were made in accordance with these rolls.

Clearly these rolls would form the basis from which to work out the percentage of population of the Seminole Na-

tion to the total population of the Five Civilized Tribes for the period 1898-1934; and if the Seminole Nation is liable at all for any part of the expenses set forth in Finding 18, it certainly would be upon this 3.08 percentage basis, and not upon a percentage of 3.72, as used by the lower court. We submit that the lower court erred in charging 3.72 per cent of this total expense against the Seminole Nation.

We believe that we have amply demonstrated to the court the unfairness of the allowances made by the lower court in the gratuity offset phase of this case, and regret that the character and extent of these items required us to make such an extensive argument.

We submit that the lower court erred in failing to require of defendant affirmative proof of the fact as to whether or not said items were a *gratuity* to the tribe and also whether they *benefited the Seminole Nation*, before permitting a gratuity offset for them under said Act of August 12, 1935.

Conclusion.

For the reasons set forth above the petitioner submits that as to the affirmative claims of petitioner the lower court has failed to give due consideration to the treaties and statutes governing the rights of the parties in this proceeding; and that as to the offset phase of this case the lower court erred in making allowances of gratuity offsets against petitioner without sufficient proof that said amounts were *gratuitously* disbursed for the *benefit* of the Seminole Nation as such.

We respectfully request this Court to correct these errors and afford belated justice to these dependent Indian wards of our government.

PAUL M. NIEBELL,
W. W. PRYOR,
C. MAURICE WEIDEMEYER,
Attorneys for Petitioner.